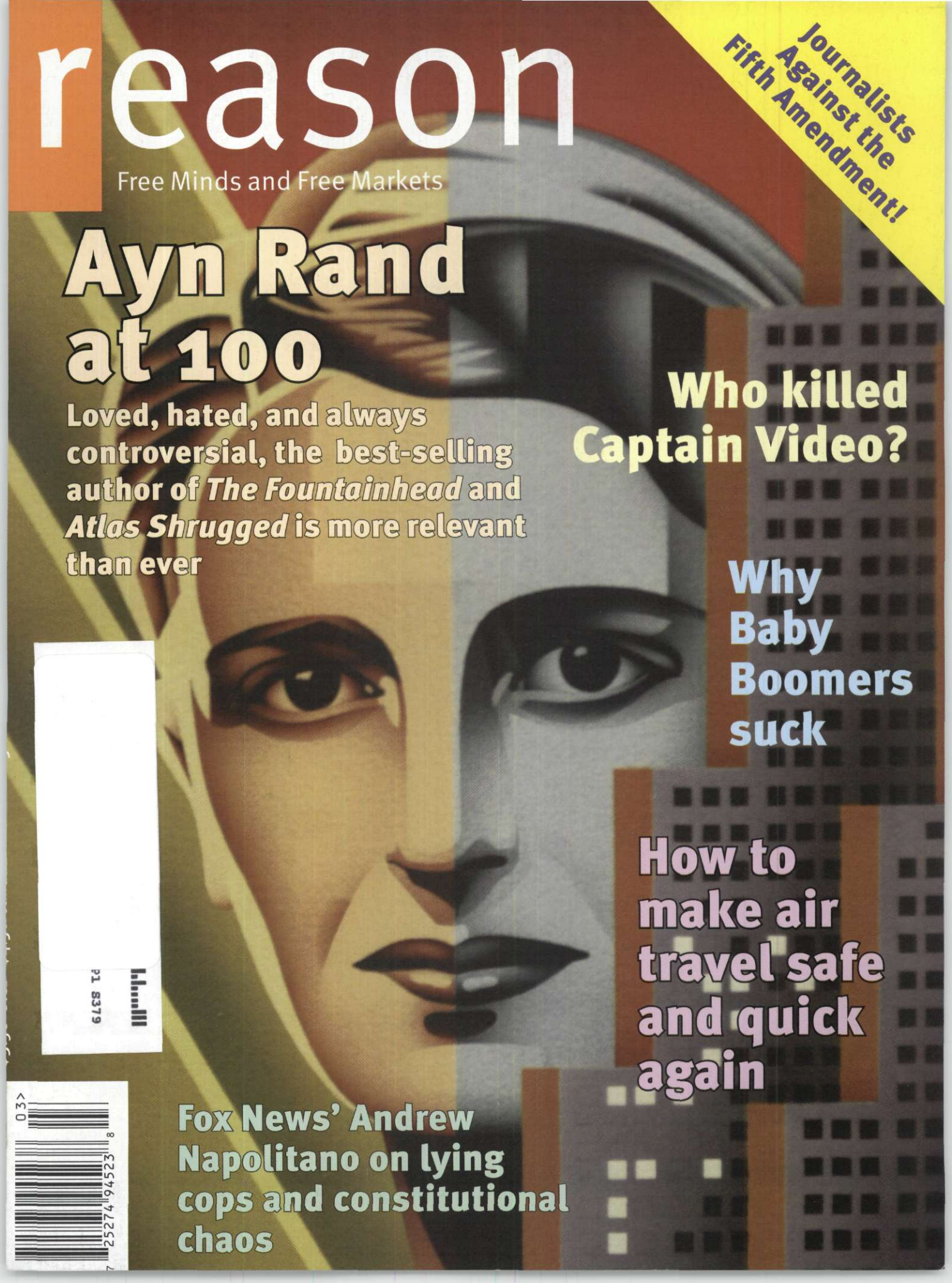
reason
Free Minds and Free Markets
Journalists Against the Fifth Amendment!
Ayn Rand at 100
Loved, hated, and always controversial, the best-selling author of *The Fountainhead* and *Atlas Shrugged* is more relevant than ever
Who killed Captain Video?
Why Baby Boomers suck
How to make air travel safe and quick again
Fox News' Andrew Napolitano on lying cops and constitutional chaos

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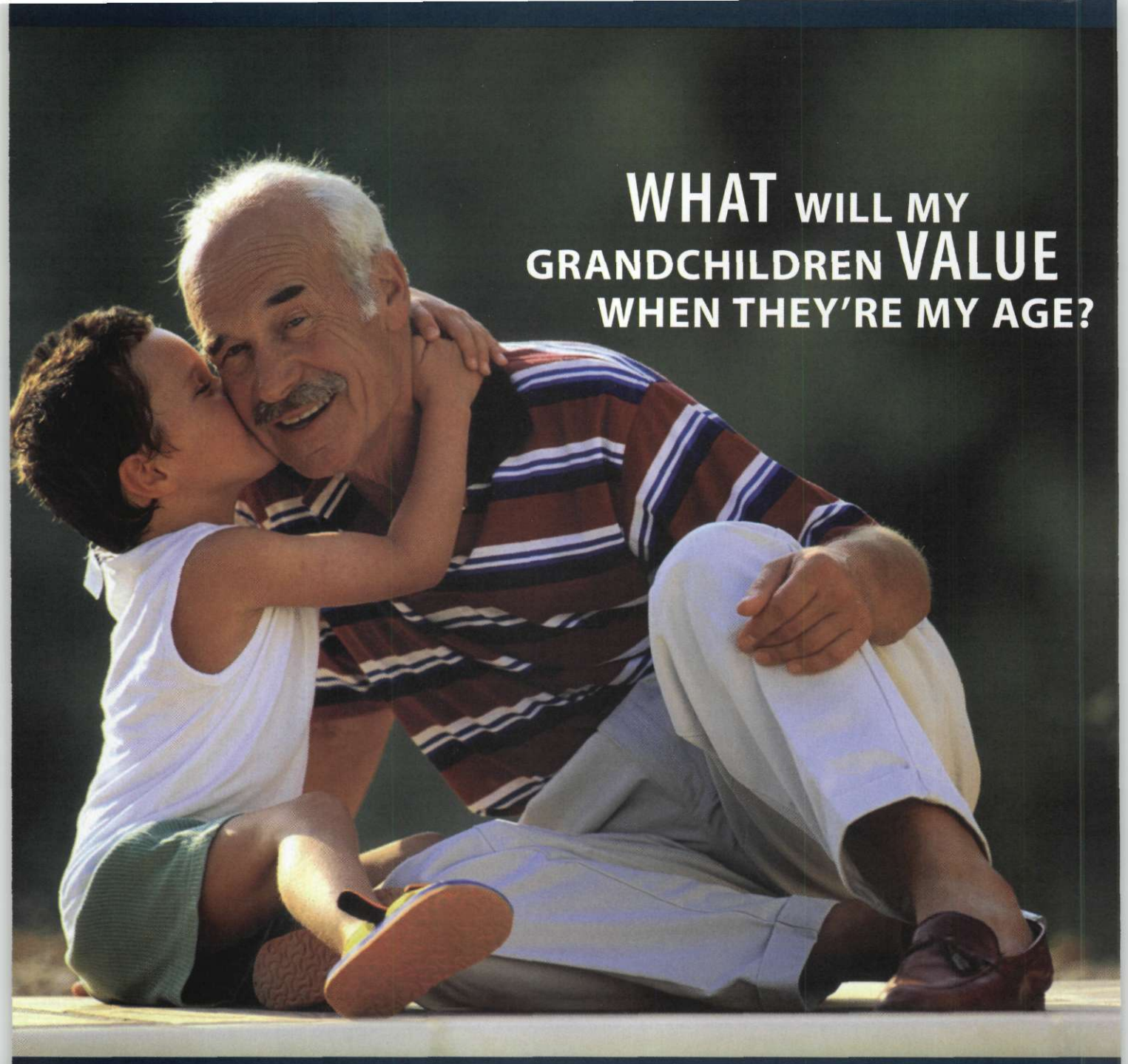

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reason
Free Minds and Free Markets

March 2005
Volume 36, No. 10

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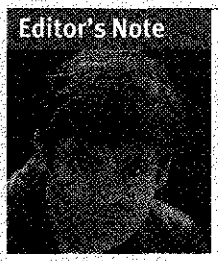

Rand Redux

LET ME ADMIT up front that I'm no great fan of this month's cover girl, Ayn Rand, whose 100th birthday falls on February 2 and whose legacy we analyze on page 22. It's a doubly embarrassing admission: Not only is Rand one of the most important figures in the libertarian movement of which **reason** is a part, but this magazine's name is an homage to her philosophy, Objectivism, which ascribes a key role to rationality. When a Boston University student named Lanny Friedlander started **reason** back in 1968 as a mimeographed call to arms—well, let's just say he very much grokked the Russian-born writer.

You'd never catch me writing a letter of complaint like the one former Rand acolyte and current Federal Reserve Board chairman Alan Greenspan sent to *The New York Times* in 1957 after the paper blasted *Atlas Shrugged*. Just what was wrong with a novel in which "parasites who persistently avoid either purpose or reason perish as they should?" huffed the man who decades later would popularize the term "irrational exuberance." I'm more simpatico with Officer Barbrady, the illiterate cop on *South Park* who declared, "At first I was happy to be learning to read...but then I read...*Atlas Shrugged*.... because of this, I am never reading again."

Yet as Contributing Editor Cathy Young shows in her brilliant essay about "Ayn Rand at 100," Rand continues not merely to draw our attention but to *command* it. A century after her birth and more than a decade after her death, Rand remains one of the best-selling and most widely influential figures in American thought and culture. As we document in "Rand-O-Rama," she casts a long shadow, not simply providing punch lines for *South Park* but infusing such recent movie hits as *The Incredibles* with what a *Times* reviewer called "a disdain for mediocrity." She is even getting newfound respect from academics.

What's the secret of Rand's cultural staying power? At her best, notes Young, Rand provided "liberal capitalism with a moral foundation." That's no small feat in a world that, even after the fall of Nazism, communism, and other collectivist ideologies, still looks with suspicion on economic self-interest. Rand also celebrated the individual in a mass age, creating a series of memorable, compelling characters who embodied or emboldened the aspirations of millions in a time of often stultifying conformity, bureaucracy, and routinization.

But as important to Rand's hold on the public imagination is the great gulf between her fictional heroes and the often tawdry, disheartening details of her own biography, especially the cult-like obedience she demanded of her inner circle. In the gap between Rand's soaring ideals and her lived reality, we see in particularly strong relief both the creative power of individual desire and its vast capacity for intolerance and delusion. In a world in which more people have more control over their lives than ever before, that's something to always be pondering.

—Nick Gillespie

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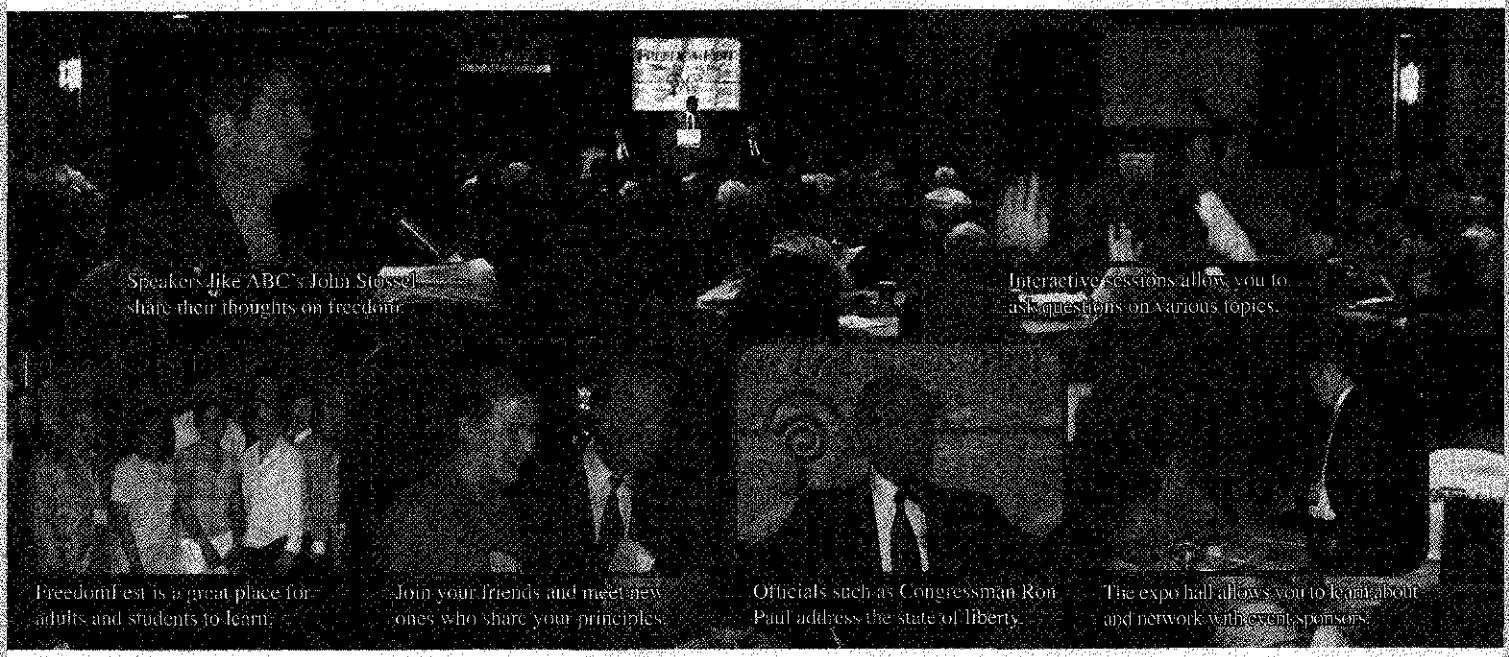
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Mary Toledo

After leaving the Soviet Union at 17, Contributing Editor CATHY YOUNG went to Italy to await an American visa. There she met a girl from Illinois who enthusiastically recommended she read the novels of Ayn Rand—a name she'd recognize years later while browsing in the library at Rutgers. In *For the New Intellectual* and Rand's anti-Bolshevik novel *We the Living*, Young says she "recognized the theme of the subordination of the individual to the collective that was being preached in the Soviet Union—something I had always rebelled against." This month Young examines the good and the bad in Rand's legacy in "Ayn Rand at 100" (page 22).

ROBERT W. POOLE JR., director of transportation studies at the Reason Foundation, penned the first **reason** cover story on air travel back in 1970, when he was a recent MIT grad working for Sikorski Aircraft. When Congress moved to nationalize airport security after 9/11, Poole was called to Washington to help craft a compromise that left some leeway for private initiative. In "Transportation Security Aggravation" (page 40), he debates air security with the Cato Institute's director of information policy studies, JIM HARPER. Founder of the privacy rights site Privacilla.org, Harper spends his non-wonk time listening to jazz and playing soccer, which—though his Cato colleagues think it's "a communist sport just because people in Europe like it"—Harper defends as an "unrecognized libertarian game."

Editorial Assistant MARY TOLEDO joined **reason** in 1990 when, after writing about heavy metal hair bands for music zines such as *Faces Rocks* and *Creem Metal*, she realized "there was no money in it unless you were in the stupid band." (She did, however, pick up a liner notes credit on Bon Jovi's *Slippery When Wet*.) Responsible for the administrative heavy lifting that keeps **reason** humming smoothly, Toledo has been with the Reason Foundation through three presidents, two editors, and two offices. A conspiracy theory and alternate-history buff, Toledo has long harbored a suspicion that the Reason Foundation is part of The Conspiracy, but promises to deny this under duress.

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THE FEDS SAY THEY WANT SCIENTIFIC PROOF THAT MARIJUANA IS MEDICINE.

BUT DO THEY?

Three years ago scientists from the University of Massachusetts and the Multidisciplinary Association for Psychedelic Studies[1] applied to the Drug Enforcement Administration (DEA) for a license to grow a research plot of marijuana.

No response.

A year ago, they asked the DEA for permission to import 10 grams from the Dutch Office of Medicinal Cannabis.

No response.

Then they asked the National Institute on Drug Abuse (NIDA) to sell 10 grams from NIDA's marijuana farm at the University of Mississippi.

Still no response.

The researchers could, of course, get all the marijuana they need from any high school or college campus in the country but that's not legal. NIDA has a monopoly on the supply of marijuana that can be used for research.[2] The Institute seems to be using that monopoly to obstruct the very research they're supposed to be facilitating.

So the scientists are suing the DEA, NIDA, Health and Human Services and the National Institutes of Health for "unreasonable delay" resulting in the obstruction of scientific research.

Science should be in the hands of scientists, not political ideologues.

Common Sense for Drug Policy
www.CommonSenseDrugPolicy.org www.DrugWarFacts.org
Mike Gray, Chair; Robert Field, Co-Chair

[1] For further information contact www.maps.org
[2] NIDA was given a monopoly only on the supply of marijuana and not on any other Schedule I drug.

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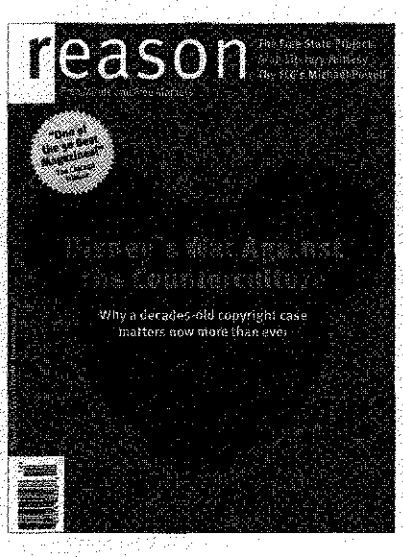

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Mouse Wars

As an author and artist I was appalled by Dan O'Neill's disingenuous rationalizations for plagiarizing Disney ("Disney's War Against the Counterculture," December). His arguments seem to be: If someone creates something that is immensely popular, they abdicate their rights to it; if someone creates something that has a special resonance for O'Neill, they abdicate their rights to it; and if a corporation he deems too large owns something, they abdicate their rights to it. The bottom line is that O'Neill was trading on someone else's creativity and originality—if not the Disney company, then the artists and writers who work for it. Would *Air Pirates* have been as successful if he had not used names and characters that were already well-known and popular?

The whole issue sounds very David-and-Goliathish, the struggling independent comic artist vs. the Disney behemoth, but how would the entire matter look if O'Neill had decided to trade upon the efforts of, say, Charles Schulz, Mort Walker, or Hank Ketchum, issuing his own versions of *Peanuts*, *Beetle Bailey*, or *Dennis the Menace* under those same titles? Whatever legal rights he may or may not have had, or believes he had, O'Neill certainly didn't have the moral right to do what he did.

Ron Miller
King George, VA

In 1972 I was asked to submit a sworn deposition in the *Air Pirates* case. "In order to communicate an irreverence toward the Walt Disney characters," I stated, "the original form must be imitated to provide the most effective vehicle of reaching the consciousness of the audience and hopefully causing them to question the one-dimensional infallibility of Disney's fairy-tale world. For any government to imply otherwise would be to foster brainwashing. In Sao Paulo, Brazil, a city official in charge of a campaign to exterminate rats said that public support for the program was adversely affected by the popularity of Mickey Mouse among children. It is in the highest tradition of a free society to encourage the testing of conflicting ideas in an open marketplace; the comic books in question, therefore, are classic examples of artistic responsibility in action."

In 1967 I published as a centerfold in *The Realist* and distributed as a poster *The Disneyland Memorial Orgy* by *Mad* artist Wally Wood. The Disney Corporation considered a lawsuit but realized that I functioned financially on a proverbial shoestring, and besides, why bother causing themselves further public embarrassment? They took no action against me, though when the poster was pirated, Disney sued the pirate, and the case was settled out of court.

The Center for Constitutional Rights represented the Chilean co-authors of *How to Read Donald Duck* in a battle with Customs. There was a law that if material came in through Customs which officials thought violated a U.S. copyright, they could freeze the material and force the importer to fight for its release. The book was an analysis of the capitalist ethic in Disney comics, illustrated with hundreds of strips. The case was won by proving that the reprinting was necessary fair use in order to comment on them.

In 1983 the Canadian artist Carl Chaplin created *Wishing on a Star* postcards for free distribution. They depicted Disneyland being blown up by a nuclear bomb. Disney attorneys threatened legal action, demanding possession of the cards. Chaplin said, "If Uncle Walt were alive, he would know that I did the painting to point up the horror of what could happen

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to all of mankind in a nuclear war." He turned over all the remaining postcards. Ironically, as a result of the lawsuit, that image was sent over the UPI wire and seen by millions who would otherwise have remained unaware of its existence.

In 1989 Disney lawyers arranged to have white paint splashed over the "innocent delightfulness" of Disney characters on murals at three day care centers in Florida. They were replaced by Yogi Bear, Fred Flintstone, and Scooby Doo. Yet another Mickey Mouse decision.

And in 1992 Britain's official artist for the Persian Gulf war, John Keane, got in trouble for his painting depicting Mickey on what looks like a toilet with a shopping cart of anti-tank missiles nearby and a background of shattered palm trees. A Disney spokesperson said they were considering legal action against possible copyright violations. The artist said the idea came to him in Kuwait City, in a marina used by the Iraqis, where he found a Mickey Mouse amusement ride surrounded by feces.

No shit.

Paul Krassner
Desert Hot Springs, CA

Biased About Bias

Nix to Matt Welch's attempt to cloud the issue of media bias ("Biased About Bias," December). Bias in news reporting is still out of control, and we should keep hammering at it.

Consider media treatment of the term "assault weapon" vs. "partial birth abortion." Both terms are linguistic ploys concocted by advocates to prejudice public debate. "Assault weapon" isn't a term used by firearms makers; "partial birth abortion" isn't used by abortion doctors. The press embraced "assault weapon" and uses it freely. "Partial birth abortion" never appears in news stories without a journalistic disclaimer.

Russell B. Garrard
Bellevue, WA

Indefensible Internment

Regarding "Indefensible Internment" (December), a reviewer should check the facts. Eric Muller writes, "While Lou Shimizu and Joe Takahashi sat in desert camps, Lou Gehrig and Joe DiMaggio played baseball."

Gehrig had already died on June 2, 1941, and was playing baseball on the Elysian Fields, if anywhere, after Pearl Harbor. DiMaggio did play a full season in 1942, but did not play again until 1946, having served in the military, along with a number of Nisei draftees of the same generation.

Muller's point is well-taken. It's his rhetoric that needs work.

Albert S. Kirsch
Bal Harbour, FL

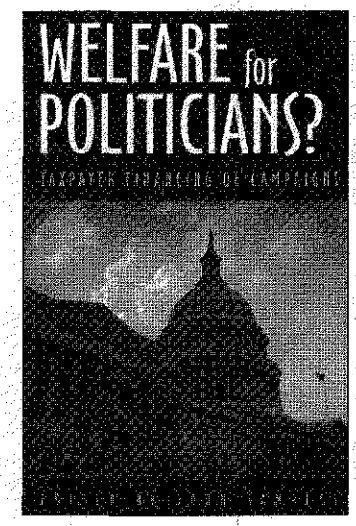
Eric Muller replies: Kirsch is correct. I must have misread Gehrig's stats.

CORRECTION: A review of the book *The End of Faith* ("Among the Nonbelievers," January) stated that the suicide bombing tactic originated with "the Malaysian communist guerrillas known as the Tamil Tigers." In fact, it began with the Liberation Tigers of Tamil Eelam, a Sri Lankan separatist group.

reason News

We're happy to welcome Kerry Howley as **reason**'s newest assistant editor. A Georgetown University graduate, Kerry was **reason**'s C. Burton Gray Memorial Intern in 2003. She joins us from *The Myanmar Times and Business Review*, where she spent the last year as a features editor and diplomatic reporter.

How Not to Reform Campaign Finance Laws



American taxpayers have contributed some $2 billion since 1976 to subsidize primary and general election campaigns for the presidency. In this book, a dozen experts consider the effects of full public funding in various states, the merits of free television time for candidates, and the problems and prospects of the presidential public financing program. Among the contributors are Patrick Basham, Thomas Finneran, Michael Malbin, and Chip Mellor. *Welfare for Politicians* is mandatory reading for those both for and against public financing.

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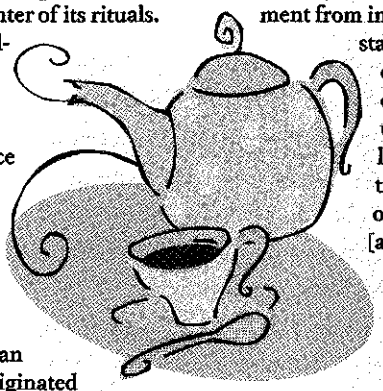
Vouchers for prodigies?; Somali success story; benefits of tax havens; mass transit for the rich; copyrighting the air; real estate and free speech; the mild, mild West

Drugs and religious freedom

Psychedelic Tea

Jacob Sullum

NEVER MIND the nausea and vomiting. For members of O Centro Espirita Beneficiente Uniao do Vegetal, drinking ayahuasca, a psychedelic tea brewed from two Amazonian plants, involves four hours of recitation, chanting, questions and answers, and religious instruction. That may help explain why the church has only 130 or so followers in the U.S., despite the drug trips at the center of its rituals.



But the federal government does not want to take the chance that Uniao do Vegetal, a synthesis of Christianity and indigenous South American beliefs that originated in Brazil, will do for ayahuasca what Timothy Leary did for LSD. So in 1999, after intercepting a shipment of ayahuasca extract bound for Uniao do Vegetal's U.S. headquarters in Santa Fe, customs agents searched the home of the group's president, seizing 30 gallons of the tea and triggering a lawsuit that may force the government to back off.

The Customs Service and the Drug Enforcement Administration say ayahuasca is illegal because it contains dimethyltryptamine (DMT), which is banned by the Controlled Substances Act. Uniao do Vegetal members argue that their use of ayahuasca is protected by the Religious Freedom Restoration Act, which prohibits the government from imposing a "substantial burden" on the free exercise of religion unless it is "the least restrictive means of furthering [a] compelling governmental interest." In November the U.S. Court of Appeals for the 10th Circuit concluded that the feds had failed to meet that test, and it upheld a preliminary injunction barring the government from interfering with the church's rituals.

In December, Supreme Court Justice Stephen Breyer stayed that injunction pending the government's appeal, but the Court later lifted the stay, allowing the group to resume its ceremonies. Should it ultimately prevail, its use of ayahuasca would enjoy a status similar to that of the Native American Church's peyote rituals. That would be a fitting outcome, since the Religious Freedom Restoration Act was a response to a 1990 Supreme Court decision that said the First Amendment does not require the government to tolerate religious use of peyote.

Vouchers for prodigies?

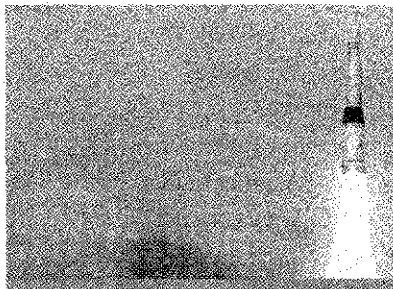
Baby Geniuses

Matt Welch

WHAT DO YOU do when you're a single mother trying to get by on a schoolteacher's salary while scrambling to feed the ravenous educational needs of your brainiac son, who read novels in a second language by age 6, attended community college courses at 7, passed the high school proficiency exam at 9, and entered UCLA at age 12?

In the case of Leila Levy,

25 years ago in reason



"A knee-jerk return to being the policeman of the world,...to manipulating the internal policies of other countries to prop up or install 'pro-American' leaders without popular support, is not an appropriate policy for a country professing a commitment to freedom."

—Robert Poole Jr., "Post-Afghanistan Foreign Policy"

"The SALT treaties bring us closer to the brink of war by continuing the policy of Mutually Assured Destruction."

—U.S. Rep. Ron Paul, "SALT-Free Defense"

"I was surprised to learn how few businesspeople knew about a private telecommunications network, operated by two private companies, MCI and Southern Pacific Communications."

—Mark Skousen, "Slash Your Telephone Bill"

"Murders and kidnappings take place all the time in American cities without evoking bellows of fury and indignation from the American masses. No, the motivation is not compassion or justice but jingoism, the feeling that the national honor—that is, the honor of the American nation-state—has been offended."

—Murray N. Rothbard, "Collective Guilt in Iran"

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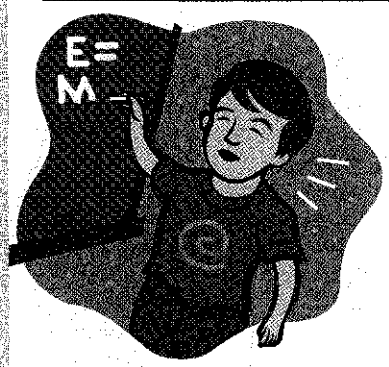


you butt heads with bureaucrats. The Los Angeles Unified School District repeatedly threw obstacles in her son Levi's way, initially refusing to test his abilities (because he was too young) and to place him in higher-grade classes (ditto). Now it's insisting, based on the state truancy law, that Levi stay in school until age 16—even though Leila can't afford full tuition at UCLA. "This woman was a basket case when she came in," says her attorney, Richard Ackerman. "I've never seen anybody so frustrated with bureaucracy in all my life."

Now that the 14-year-old Levi is in college, Leila's lawyer is trying a new tack: getting the state to pay for his tuition. California doesn't just require children under 16 to be in school; the state's constitution says state-provided education must be "suitable" for the child.

Among other things, Ackerman is claiming UCLA tuition actually is *cheaper* than the per-student cost of educating most 14-year-olds. "All they need to do is write out the same check they would have if he was a special ed student with extraordinary needs," he says.

Barring that, Leila is suing California to create a voucher to pay for the neglected needs of extremely gifted kids. "This case," Ackerman says, "has the opportunity to overhaul the system." ▪

Does anarchy mean chaos?

Somali Success Story

Brian Doherty

THE WEST AFRICAN country of Somalia has lacked a nationally recognized central government since Siad Barre's dictatorship collapsed in 1991, and it has been without large-scale American intervention since 1994. A supposed national government run by former warlord Abdullahi Yusuf Ahmed operates out of Nairobi, Kenya, not in Somalia itself. The country is notorious as an anarchic zone where ruthless warlords push around pitiful peasants and government is completely absent.

That chaotic picture has elements of truth; a recent BBC report on urban Somalia found no shortage of people lamenting the lack of free passage down roads and the amount of their income paid as kickbacks to armed gangs. But in a recent study two World Bank economists found a surprising side to Somali statelessness. Its "private sector experience," Tatiana Nenova and Tim Harford write, "suggests that it may be easier than is commonly thought for basic systems of finance and some infrastructure services to function where government is extremely weak or absent." They report that "Somalia boasts lower rates of extreme poverty and, in some cases, better infrastructure than richer countries in Africa."

Areas where Somalia is doing as well as or better than neighboring countries include the percentage of population living on less than $1 a day, roads per capita, and telephones per thousand people. (Somalia's highly competitive, cheap, and thorough telecommunications industry includes many functioning Internet cafés in the capital city of Mogadishu.) Areas where Somalia lags behind—sometimes far behind—include literacy and access to safe water.

The study (available at rru.worldbank.org/Documents/280-nenova-harford.pdf) doesn't advocate statelessness as a positive solution. But it does note that people have a tenacious ability to figure out ways for life to go on, no matter what the governmental circumstances. It outlines three chief methods by which Somalis have addressed their large-scale social and economic needs without government: traditional clan systems (which provide services such as savings, insurance, and legal dispute resolution); simple market transactions (for small-generator electricity, among other things); and foreign sources (for example, airplane crews are leased from international suppliers, and the U.S. dollar provides monetary stability). ▪

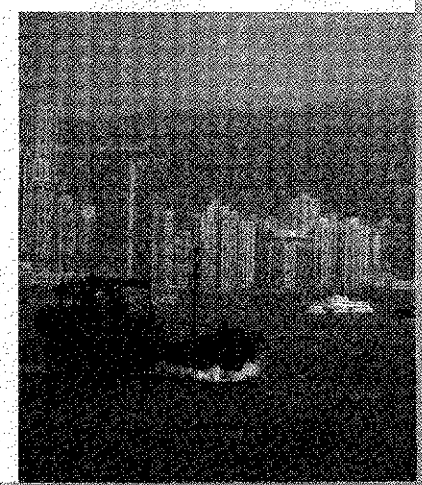
Benefits of tax havens

Gimme Shelters

Julian Sanchez

LOW-TAX ZONES such as Hong Kong, Ireland, and various Caribbean nations are routinely blasted as "tax havens" by such groups as the Tax Justice Network, to say nothing of politicians, who resent them for siphoning away economic activity and depriving high-tax nations of "their" precious tax revenues. Recent work by a University of Michigan economist suggests this hostility is misplaced.

James R. Hines, in a National Bureau of Economic Research (NBER) paper co-authored by Mihir Desai and Fritz Foley of Harvard Business School, found that "haven activity does not appear to divert activity from non-havens." In fact, their calculations indicate that "firms establishing tax haven operations expand, rather than contract, their foreign activities in nearby countries." When firms can reduce their tax burden by means of affiliates in tax haven countries, the authors argue, sales and investment in nearby nonhaven nations increase. »



Quote

"You know, he grows heroin, cocaine, tomatoes that are going to have genomes in them that could, at some point, lead to tomato children that will eventually affect Boston." ▪

—Supreme Court Justice Stephen G. Breyer, probing the limits of federal Commerce Clause powers with a trippy hypothetical during the November 29 oral arguments in *Ashcroft v. Raich*

Source

Xenophobes sometimes seem hard pressed to decide which they dislike more: immigrants who don't work, acting as a drain on social services, or immigrants who do work, thereby "stealing" jobs from domestic workers and driving down wages. But the United Nations' "World Economic and Social Survey 2004," available at un.org/esa/policy/wess, suggests that neither caricature provides much cause for concern. The report finds that "migrants do not have a significant impact on the labor market" because they add to consumer demand as well as labor supply, while some create jobs through entrepreneurship. They also "tend to be net contributors to fiscal revenue," paying more in taxes than they cost the welfare and educational systems. ▪

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Brickbats

Australian police e-mailed child porn to some 1,800 schools across the state of New South Wales. The images of three young girls, which were found during an investigation, were sent to the schools for help in identifying the victims. But the software used to crop the photos didn't work the way they thought it would, and the full images remained in many of the files.

Guadalupe Madrigal fumbled a few words while performing Mexico's national anthem before a soccer game. The government fined her $40 for her mistake.

San Francisco officials are considering charging grocery stores a 17-cent tax on each bag they give customers. The stated objective is to reduce the use of plastic bags, but the tax would apply to all sacks, including paper.

The Spanish government has apologized to the owners of a Madrid bar where several soldiers panicked customers with an unannounced mock shootout. A sergeant who was teaching other soldiers how to protect people under threat pulled a fake gun and began "shooting." The bar's owners and the other patrons didn't realize what was happening.

Mike Hayes got angry when traffic wardens kept ticketing customers outside his chips stand in an outdoor market in Oldham, England, while ignoring flagrant parking violations by official vehicles. So he put up a sign saying he wouldn't serve traffic enforcers. The city council responded by threatening to kick him out of the market unless he takes down the sign and serves everyone.

The government of New South Wales, Australia, has fined rancher Nicholas Ennis $72,000 for unsafe working conditions following the death of cowboy Daniel Croker, who was trampled after he fell from a horse. Authorities say Ennis should have made Croker wear a helmet while mustering cattle. Ranchers say helmets will make accidents more common and increase the risk of heatstroke and sunburn.

After the city of Chicago towed Adrienne Leonard's 2001 Kia Sephia, it demanded $1,000 for three parking tickets, towing, and storage charges. Leonard could come up with only $700, so the city sold the car—for $125.54. Leonard is still liable for all the fees, as well as the money she still owed on the car. A politically connected towing firm's contract allows it to buy all unclaimed cars for scrap prices; then it auctions them to the highest bidder. Neither the city nor the owners get any of the money.

As a judge, Antonio Marreiro gets to be called "Your Honor" or "Your Excellency" in court. The Brazilian jurist liked it so much, he went to court and won an order granting him the right to be called by those terms even outside of court. Anyone in his Rio de Janeiro neighborhood who slips and calls him by his name risks being fined.

Charles Oliver

›

But don't the haven countries shortchange their own citizens by offering such favorable conditions for multinational corporations? In another NBER working paper, Hines suggests they don't. During the 1980s and '90s, he notes, real per capita GDP grew faster in haven countries than the world average. And with government sizes averaging 25 percent of GDP, compared to a global average of 20 percent, haven states don't seem to be starved for revenue either.

Transit for the rich

Railroading the Poor

Ted Balaker

THE CHIEF argument for public transit is that it's necessary for those who can't afford cars. But many cities tailor their transit services to those who need them the least. The desire to entice rich people—commonly called "choice" riders—is a big reason why pricey light-rail lines have broken ground in so many cities, and why more than two dozen cities are angling for federal funds to build more.

Rail is much less flexible than a bus system and can cost five to 50 times as much. Add competitive contracting, which reduces operating costs by more than a third, and buses can be an even better deal. So public officials justify the hefty price tag for light rail by claiming that it's the only way to get affluent motorists out of their cars.

But there's nothing inherently unappealing about the bus. As long as it's fast, convenient, and comfortable, commuters will hop onboard. Instead, rail lines often replace bus lines, and this means the poor must endure more transfers as they go from bus to rail and back. And since light rail costs so much more than buses, devoting money to rail will improve mobility far less than devoting the same amount to buses.

Bus riders in Los Angeles are particularly familiar with this sad story. Beginning in 1986, local policy makers began to divert funds from a fairly successful bus ridership program toward rail construction. Eventually, the Bus Riders Union, a grassroots organization that represents residents who depend on mass transit, cried foul. It has been locked in a legal battle with L.A.'s Metropolitan Transportation Authority for nearly a decade.

Yet rail remains the favored child. After Los Angeles' latest light-rail project, the Gold Line, fell well short of ridership projections, local officials forged ahead with plans for a $900 million extension.

WIPO roundup

Copyrighting the Air

Jesse Walker

IN NOVEMBER the World Intellectual Property Organization (WIPO) met in Geneva to negotiate a new broadcasting treaty. The old agreement, known as the Rome Convention, had been around since 1961; there had been a lot of technological changes in the ensuing four decades, so there was plenty to incorporate into the new accords. Most participating countries wanted the document to address the issue of "signal piracy"—the illicit interception of coded transmissions, a practice that often crosses borders. But Europe and America had a larger agenda.

Under their pressure, WIPO proposed a treaty that would award broadcasters a copyright »

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Balance Sheet

Jeff A. Taylor

Cuba Libre

At least FBI agents know torture when they see it. Several agents are disturbed enough about the way the Pentagon runs Camp X-Ray to write memos on it, which the ACLU has dragged into the light of day.

Fish Police

The E.U. decides that fishing can continue in Scottish cod-fishing grounds after Brussels settles for restrictions on the age of fish that can be caught.

Oh, K

The Army tests the animal tranquilizer ketamine, street name Special K, as a possible substitute for morphine. Don't tell the DEA, but the military likes the way K can kill pain and still leave soldiers able to function. Or dance.

Miami Vice

Hot dog vendors outside a Miami courtroom seize an entrepreneurial opportunity and charge those with court business $2 to $10 to hold cell phones and other court-banned gizmos. Lawyers had resorted to hiding them in potted plants.

Salt Solution

University of Florida researchers use waste heat from electrical power plants to power the desalination process, which could make fresh water cheaper and more available.

Oil Change

The head of Pemex, Mexico's state-owned oil company, asks lawmakers for rules that would allow it to seek private investment. Luis Ramírez says even with high oil prices, Pemex needs help with its $37 billion debt to avoid selling its crude reserves.

Charter Mandate

Harvard research reveals that the longer charter schools operate, the greater the improvement among students. A nationwide study finds if a charter school has been operating for more than nine years, test scores are 10 percent higher compared to neighboring noncharters.

Capsule Summary

Health worries surrounding Celebrex, Vioxx, and other heavily marketed drugs prompt calls for advertising restrictions, as if ads had anything to do with drug safety or effectiveness. Less information seldom solves problems.

Scanning Pan

Your friends at the Transportation Security Administration want brain-mapping scanners to uncover "suspicious behavior" in airline passengers.

Supply Snort Economics

The Washington Office on Latin America finds that the drug war has failed to raise the U.S. street price of either cocaine or heroin. Instead, U.S. efforts like the $3 billion Plan Colombia have helped to sow woe across South America.

Hot Loads

Porcelain commodes and cat litter are among the substances setting off radiation alarms designed to sniff out nuclear terror at ports and border crossings. So are the 26 million Americans who get some sort of radiation treatment each year.

Alabama Getaway

Covington County Circuit Judge Ashley McKathan hears cases while wearing a robe with the Ten Commandments stitched on the front. McKathan says the Decalogue can help a judge "know the difference between right and wrong." If so, it's unclear why he hasn't committed it to memory.

Hobby Lobby

Mediaweek finds that 99.8 percent of all indecency complaints received by the FCC in 2003 came from one group, the Parents Television Council.

Suspicious Silence

Treasury Secretary John Snow and White House Chief of Staff Andrew Card hint that busting the income cap for Social Security taxes, now at $90,000, may be a part of Bush's Social Security reform plans.

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Data

Ride 'Em Cowboy

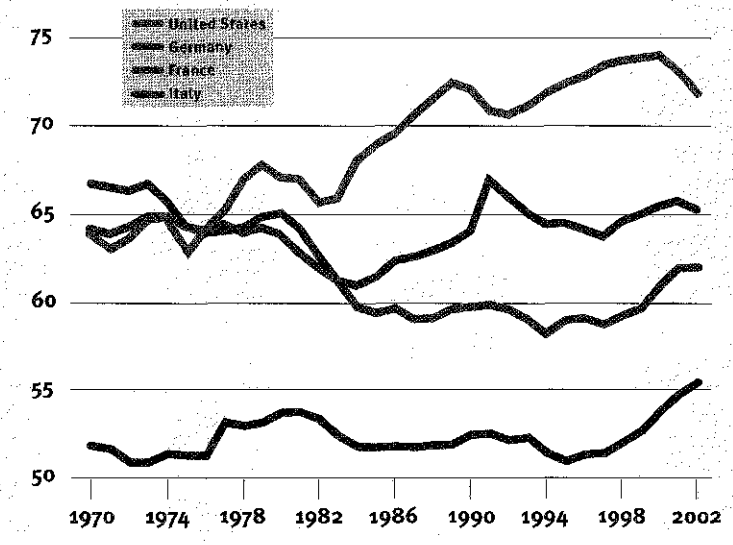
Julian Sanchez

Americans, they say, know little about the rest the planet. But *In Cowboy Capitalism* (Cato Institute), the German business journalist Olaf Gersemann observes that many Europeans have some funny ideas about economic conditions in America. Among them: that Americans commonly work three jobs to make ends meet, and that low U.S. unemployment is entirely due to the high proportion of the population that's incarcerated.

The latter isn't a bad guess, given our massive population behind bars. But the numbers—more precisely, the proportion of the working-age population that's actually working—don't bear it out. While employment rates in the U.S., France, and Germany were quite similar as recently as the 1970s, the last three decades have seen a steady divergence. Which is the more compassionate economic system: one that provides an expansive safety net when citizens can't find work, or one that makes it less likely that they'll need it?

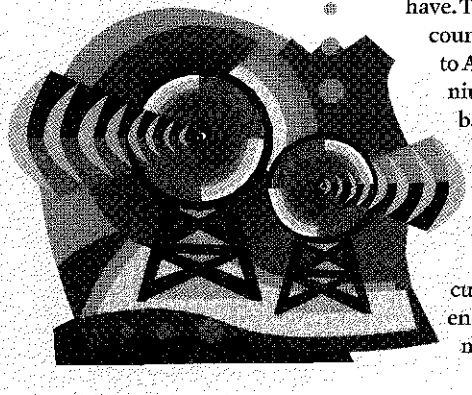
Employment Ratios in the United States, Germany, France, and Italy

(employed persons between 15 and 64 years of age as a percentage of working-age population)



Source: *Cowboy Capitalism*, Organization for Economic Cooperation and Development

› in the signals they transmit, even when the transmission's contents are in the public domain.



In fact, the new rules would give the broadcasters more rights over the content than its creators have. They would also require countries to pass laws similar to America's Digital Millennium Copyright Act, which bans "circumvention" of technological barriers to copying. One portion of the proposal, called Alternative V, would extend such anti-circumvention restrictions to encrypted broadcast signals, effectively outlawing decryption of *all* kinds.

Several countries objected to these measures, with Brazil and India leading a movement to restrict the treaty to signal piracy. Their one significant victory was to defeat an American proposal that would extend the agreement to cover webcasting. The rest will survive until the next round of negotiations in mid-2005.

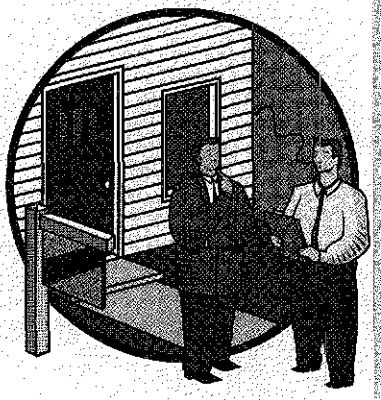
Opponents of the accords have alleged a number of petty dirty tricks. Blogging from the negotiations at the Electronic Frontier Foundation's site, author Cory Doctorow noted that handouts critical of the proposals "were repeatedly stolen and pitched into the trashcans in the bathrooms." Needless to say, the treaty contains no penalties for this sort of piracy. ▪

Real estate and free speech

Letting Brokers Speak

Jacob Sullum

USUALLY WHEN A court refuses to recognize a privilege for professional journalists, it's seen as a defeat for the First Amendment. In one recent case, it was an unambiguous victory. In November a federal judge overturned a California law requiring any business that earns money by



listing homes for sale to obtain a real estate broker's license—unless the business happens to be a newspaper.

The distinction, presumably motivated by a desire to avoid the appearance of infringing on freedom of the press, never really made sense, and with the advent of the Internet its absurdity became glaringly obvious. In response to a lawsuit filed by the Institute for Justice on behalf of ForSaleByOwner.com, U.S. District Judge Morrison C. England noted that "many newspapers now maintain websites operating in much the same manner as the site generated by FSBO"—charging property owners for listings and offering information and advice for buyers and sellers. Noting that "the distinction drawn between the two publishing mediums appears wholly arbitrary," England concluded that "California's real estate

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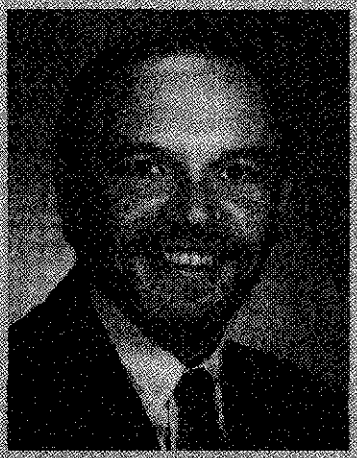
Mild, Mild West

Brian Doherty



Terry Anderson

The 19th-century American West is usually remembered as a region of rootin'-tootin' desperados brawling in a lawless land. In *The Not So Wild, Wild West: Property Rights on the Frontier* (Stanford University Press), Terry Anderson, president of the Property and Environment Research Center, and Peter J. Hill, an economist at Wheaton College, use the insights of the New Institutional Economics to paint a different picture of frontier history, with businessmen developing sensible property institutions to meet the West's varied needs. Senior Editor Brian Doherty talked to Anderson in December.

Q: Why do we have such a skewed vision of the American West?

A: The truth behind the vision of the wild, wild West is found in a relatively few stories. It would be like going into a modern city and finding seven shootings on one day and concluding that the city must have been a chaotic place when mostly it's a place of social cooperation. If you went to a bar and got drunk [in the old West], you could get into a good fight. But when it came to developing institutions for how grazing lands are used or mining claims and water allocated, those were done peacefully. People recognized the zero-sum nature of constant conflict.

Early Western development outpaced the federal government, so there was a ground-up building of institutions. But when the feds caught up, much of that was reversed. The most dramatic example was that Indian wars replaced trading between settlers and Indians.

Q: What were some of these institutions?

A: Most ingenious to me were the customary grazing rights established by cattlemen. People associate barbed wire with Western development, but it was a latecomer compared to the first cattle drive. Cattle owners had to define boundaries and keep cattle within those boundaries. So they formed associations that manned line camps, where the "line" was the property line between customary grazing districts. Cowboys lived along the line to contain cattle and prevent rustling.

Another example is the evolution of mining claims. Rather than shooting at one another to get the richest veins, miners developed rules to determine what one had to do to establish a claim and maintain it, and a peaceful means of allocating mining claims evolved.

Q: You debunk the notion of Indians as too spiritual to deal with property.

A: Where they seemed to live in harmony with the earth were areas where they established property rights, like in fishing streams in the Pacific Northwest, where Indians systematically harvested small fish, letting larger ones go upstream to spawn, resulting in larger offspring.

licensing scheme impermissibly differentiates between certain types of publications carrying the same basic content."

In finding that the content of ForSaleByOwner.com was fully protected by the First Amendment, England cited a 1999 decision (also the result of an Institute for Justice suit) in which the U.S. District Court in D.C. rejected a federal licensing requirement for people who publish advice about commodity trading. Both cases involved the regulation of speech under the pretext of regulating professional services.

In addition to protecting freedom of speech, eliminating California's onerous licensing requirement—which involved up to two years of courses and/or apprenticeship, followed by a broker's exam—benefits home sellers, since Web-based listing services can save them money by eliminating broker's commissions and other fees. ■

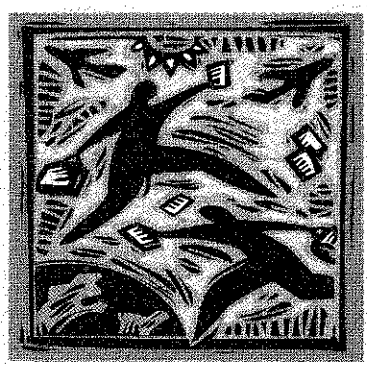
Travelers get chipped

No Passport to Privacy

Julian Sanchez

A CLOSE LOOK at your passport will reveal your age, your place of birth, where you've been lately, and, usually, an awful picture. But travel documents could soon reveal far more—and from a distance. In October the Government Printing Office awarded $373,000 in contracts to the firms SuperCom, Axalto, BearingPoint, and Infineon Technologies to produce a new generation of smart passports embedded with biometric RFID chips capable of transmitting data to readers dozens of feet away. By the time you read this, the first of them may already have been issued.

Few object in principle to biometric passports, which should make it more difficult for terrorists or criminals to cross borders with forged or stolen documents. But many civil libertarians are concerned that the "contactless" chips—as opposed to cards that only give up their information upon direct contact with a reader—lack adequate security precautions and are susceptible to unauthorized "sniffing" by identity thieves or government snoops hoping to gather information covertly from passport holders.



Computer security consultant Kevin Barrows, a former FBI agent who worked on high-profile identity theft cases, argues that the information encoded on smart chips—for now, primarily data to be used by facial recognition scanners—would be of little use to identity thieves, unlikely to be worth the trouble of stealing. But security guru Bruce Schneier remains concerned: "Initially it's just going to be the photograph and a few other bits of data, but these things change. And I don't necessarily want to walk around the Third World broadcasting that I'm an American."

The privacy conscious should be able to shield their documents from surreptitious sniffers by covering passports in a metal sheath. "In this case," jokes Schneier, "a tinfoil hat really is the answer." ■

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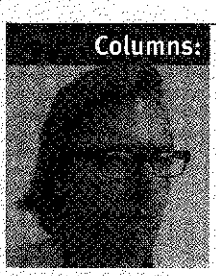

Taking the Fifth

When journalists threaten our right to remain silent

DECEMBER 2004 MAY go down in history as the month it suddenly became fashionable to threaten and even punish American reporters with jail. You could make a plausible case that over just three days, December 8–10, there was more serious judge-on-journalist action than in the three decades prior to George W. Bush's first oath of office:

December 8. *Time*'s Matthew Cooper and *The New York Times*' Judith Miller appeared in federal court to appeal an October contempt-of-court ruling. The judgment threatens both with 18-month prison sentences for not complying with a special prosecutor's order to cough up the sources who told them that Valerie Plame, wife of Bush administration critic Joseph Wilson IV, was a CIA agent. Miller hadn't even written an article about Plame.

December 9. Jim Taricani of NBC affiliate WJAR-TV in Providence, Rhode Island, was sentenced to six months of house arrest for refusing to tell a federal judge where he got an FBI surveillance videotape of a local mayoral aide accepting a $1,000 bribe. Taricani's source, an attorney who represented a city tax official, had outed himself the week before, but the judge said he wanted to send a message that "reporters do not have complete authority to decide when sources can be kept secret."

December 10. *The Washington Post*, citing "officials," revealed details about a previously secret and congressionally unpopular $9.5 billion spy satellite program, prompting the National Reconnaissance Office (which oversees defense satellites) to call for a Justice Department investigation into the leak.

Compare that to 1970–2000, when—according to the Reporters Committee for the Freedom of the Press, which has surveyed the issue extensively—no American journalist spent "any significant amount of time behind bars" for refusing to divulge a confidential source.

December's splashiest leak came from the world of baseball, where the secret grand jury testimony of seven-time National League Most Valuable Player Barry Bonds was published at length in the *San Francisco Chronicle*, triggering an anti-steroids outcry from the Golden Gate Bridge to the White House. In response to the *Chron*'s chronic leakage, U.S. Attorney Kevin Ryan requested a formal Justice Department investigation to hunt down the illegally loose lips. Three *Chronicle* reporters already have received subpoenas, and editor Phil Bronstein has vowed to defy any judicial source-disclosure order.

"The First Amendment...allows us to publish stories we feel are of interest to the public," Bronstein wrote in a December 12 note to readers. "That's the same right that allows you to express yourself freely....The public's right to know is basic to our democracy and one of the few tools the public can wield to challenge and respond to the power of government. The major tool is the Constitution."

Bronstein, like many editors criticizing the recent wave of government pressure, had it almost exactly backward. Under current law, reporters' ability to shield sources from the long arm of the law is not a federal right for all Americans but a privilege granted in 31 states and the District of Columbia to the limited category of human being known as "journalist." And by wearing the First Amendment like a badge, Bronstein is neatly evading his role in helping the government eviscerate another part of the Bill of Rights. The amendment that's really under assault is not the First but the Fifth.

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Besides putting pressure on journalists, the Bonds, Plame, and Rhode Island cases have one crucial element in common: Each is the direct result of the federal government's extraconstitutional prosecutorial power run totally amok.

All three are federal grand jury cases. As Timothy Lynch, Thomas Dillard, and Stephen Johnson argued persuasively in a May 2003 Cato Institute paper (cato.org/pubs/pas/pa476.pdf), "the government has been using the façade of the 'grand jury process' to subvert the Bill of Rights—especially the Fourth Amendment's ban on unreasonable seizures of private papers and the Fifth Amendment's ban on compulsory examination under oath."

The Fourth Amendment requires law enforcement to demonstrate probable cause to an independent judiciary before searching a suspect's person and property or seizing his assets. A grand jury—which is supposedly a citizen fact-finding body charged with determining the likelihood of a crime but in reality more resembles a fishing expedition dominated by a federal prosecutor—can unilaterally issue subpoenas to seize any assets and compel testimony from any witness.

The Fifth Amendment prohibits the government from compelling testimony that could be self-incriminating, and the *Miranda* decision gives felony suspects the right to an attorney. But grand jury witnesses—at least those who don't make immunity deals prior to their testimony—typically don't know if they are suspects until *after* the hearings. In the meantime they can be forced to answer any question, without a lawyer present, under penalty of prison, and are

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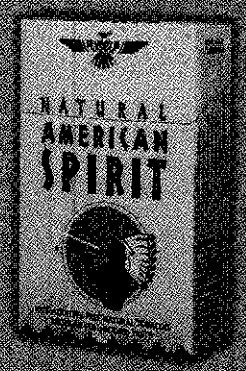

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subject to self-incriminating "perjury traps" if they should demonstrably fudge the truth under oath.

Now journalists are joining their fellow citizens as targets. Before the current administration, extraconstitutional grand jury prosecution powers were used sparingly against news organizations. According to the Justice Department, only 17 federal subpoenas were issued to unearth journalists' confidential sources between 1991 and September 6, 2001. That number may have been surpassed in 2004 alone, when in addition to the cases listed above, six reporters were found in contempt of court for refusing to name sources who cast aspersions on former Los Alamos scientist Wen Ho Lee.

The Lee case, like many of the others, has been cheered on by various newspaper columnists and other media pundits, who routinely fail to note (let alone criticize) the adverse side effects of giving the government ever more prosecutorial power. As *Washington Post* columnist Richard Cohen commented in December about the Plame grand jury, "The press, alas, is getting what it wanted."

The Plame case is a festival of unintended consequences. As former Reagan administration official David Rivkin and lawyer Bruce Sanford observed in a sharp December 14 *Wall Street Journal* op-ed, the grand jury in that case has been convened to enforce one law, the Intelligence Identities Protection Act of 1982, that was aimed at double agents who rat out operatives to the enemy, and it had been used in just one successful prosecution in 22 years.

If Judith Miller and Matthew Cooper go to jail, Rivkin and Sanford wrote, "We will have ended up with the precise situation the press feared when it fought against the...bill 20 years ago—reporters, not enemies of the CIA, facing prison—and yet another testament to the mess that happens when Congress tries to criminalize certain kinds of speech."

The distinction is lost on the *Chronicle*'s Bronstein. Grand jury secrecy is one of the few protections offered to witnesses called to testify; in the words of the Cato paper, it "protects the reputation of the people who fall under suspicion but whom the grand jury ultimately declines to indict because of insufficient evidence." Yet Bronstein had the gall to compare his publishing of Bonds' testimony with *The New York Times*' 1971 publication of the Pentagon Papers. "We don't believe that it's our responsibility to enforce federal secrecy provisions surrounding grand jury proceedings," he huffed.

Newspapers, at least in my book, should feel free to print most anything they can get away with, especially when it comes to the government's business. But they should do so bearing in mind the unintended consequences of empowering runaway prosecutors at the expense of compelled witnesses, of emphasizing the First Amendment at the expense of the Fifth, and of encouraging the federalization of crime at the expense of individual liberty. Then again, maybe that's precisely what people like Bronstein intend.

"This case might well have run its course without the potential policy changes," he wrote, "had *The Chronicle* not published the testimony it did." ■

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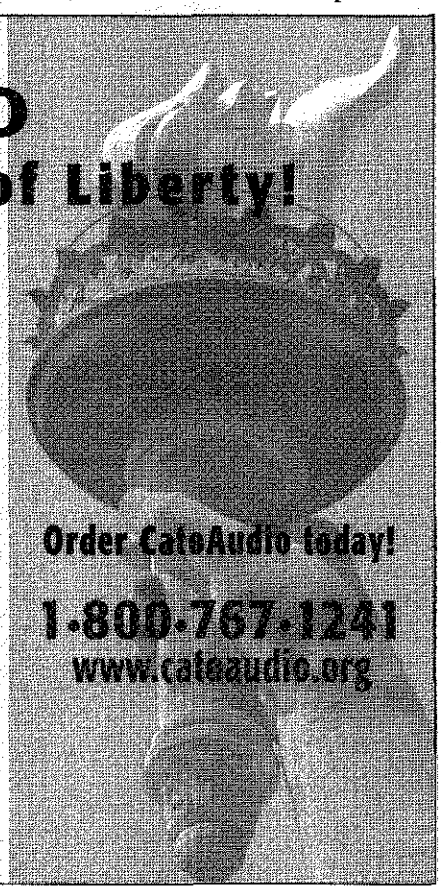

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God or Mammon

When religious groups get caught between their principles and their subsidies

THE SALVATION ARMY, with its bells and kettles, is ubiquitous in the Christmas season. In our contentious times, it is also the center of a controversy over religion, public funding for charities, and discrimination.

In May the *New York Post* reported that the Salvation Army, which has provided social services and Christian ministry to the poor around the world for more than 125 years, could be pulling out of New York City rather than provide health insurance benefits to domestic partners of gay employees, as New York City law may soon require. The legislation, passed in May, would require all businesses and nonprofits that have contracts with the city worth at least $100,000 to provide the benefits.

At this writing, New York Mayor Michael Bloomberg, a moderate and generally pro-gay rights Republican, is suing to block enforcement of the legislation, which is also vehemently opposed by Catholic Charities. (One of Bloomberg's appointees to the city's Human Rights Commission, National Gay and Lesbian Task Force Executive Director Matt Foreman, resigned from the commission over the mayor's position on this issue.)

Regardless of how the skirmish is ultimately resolved, the question of whether religious organizations with secular functions will have to sacrifice their traditional moral beliefs to modern anti-discrimination laws will surely remain at the center of the culture wars.

This is not the first time the Salvation Army, which defines itself as an evangelical Christian church, has faced this issue. In 1998 it chose to forgo $3.5 million a year in public funding in San Francisco after the city passed an ordinance requiring all firms with city contracts to offer benefits to their staffers' domestic partners. In 2001, with similar problems looming in Los Angeles and several other major West Coast cities with legal protections for domestic partnerships, the Salvation Army's leadership approved a policy that would allow employees in its Western region to buy insurance coverage for one "legally domiciled adult"—who could be a same-sex partner or a relative sharing the employee's household. Right-wing religious groups such as Focus on the Family and the American Family Association were quick to cry foul, lamenting that the Salvation Army was trying to "ignore the moral standard for behavior set by God." Faced with the prospect of losing millions in donations from conservative Christians, the national leadership reversed itself and rescinded the policy allowing domestic partner benefits.

A similar conflict has arisen around the issue of insurance coverage for contraception. In California, Catholic Charities sued for an exemption from the state law mandating that employers who provide prescription drug coverage for their workers also cover the cost of contraceptives. The law does contain an exemption for religious employers such as churches. But in May 2004 the California Supreme Court ruled that Catholic Charities was not a religious organization for the purposes of the law: It offers "secular" services such as housing and immigration assistance to people of all faiths, employs Catholics and non-Catholics alike, and does not directly mix its services with Catholic preaching.

The sole dissenter, Justice Janice Rogers Brown, accused the government of "an intentional, purposeful intrusion into a religious organization's expression of its religious tenets and sense of mission." Yet one of the ironies

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of the case is that Catholic Charities had long downplayed its religious mission—in part to qualify for the government funds that make up two-thirds of its budget.

The partnership between religious charities and the state goes back to the 1960s, when, as part of the War on Poverty, the federal government began to dole out grants for social services to community organizations, including churches and church-based groups. The money came with strings attached: It could not go to programs in which secular social services (food banks, homeless shelters, job training programs) were too closely intertwined with a religious mission, such as Bible studies or proselytizing.

The first breach in this wall of separation was made not by theocrats in the Bush White House but by the Clinton administration. The 1996 welfare reform law created a "charitable choice" provision, allowing religious charities to accept various forms of direct or indirect federal subsidy "on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such programs."

Among other things, these changes meant that government-funded programs could be provided in houses of worship, that religious art could be displayed on the premises of such programs, and that the religious programs getting the money could discriminate against their employees on the basis of religion. (The use of federal funds for proselytizing and explicitly religious missions, however, was still prohibited.) Bush's much-discussed "faith-based initiative" did little more than take Clinton's measure a step further by making a special effort to promote religious charities and expanding the range of activities that could be covered under this provision from assistance to the needy to virtually all government-funded social programs.

As the controversy over domestic partnership laws illustrates, the allocation of federal funds to religious organizations raises some tough issues. Should taxpayer money subsidize groups that discriminate against some citizens? Most Americans do not yet see same-sex marriage as a civil right, so the Salvation Army's refusal to endorse same-sex domestic partner benefits is likely to be seen as a legitimate exercise of religious belief. The same is probably true of Catholic Charities' anti-contraception stance.

But what if, for instance, a faith- based social service refused to hire married women, or refused, on scriptural grounds, to put women in leadership positions? Should religious belief excuse an organization from having to follow laws against sex discrimination, particularly in the public sector? And if so, why should that exemption be limited to organizations with an explicitly religious mission? Why not extend it to the deeply religious owner of a secular business who wants to run his enterprise in accordance with the principles of his faith?

If social conservatives tend to brush aside these questions in their conviction that religion is a socially beneficent force, liberals have their own blind spot, overlooking the fact that nonreligious dogmas in the nonprofit sector can be equally problematic. For nearly three decades, for example, federal and state money for domestic violence programs has gone to feminist groups whose missionary zeal fully matches that of any church. These programs not only serve as vehicles for a narrow sectarian ideology; they also habitually discriminate on the basis of gender, both in the provision of services and in employment.

In 1998, Independence House, a battered women's program in Massachusetts that has had longstanding service contracts with the state Department of Public Health and Department of Social Services, appointed a man, Richard Costa, as its new director. The decision caused an outcry from activists who accused the agency of betraying its feminist roots, sparking several resignations from its board. (Costa was dismissed six months later.)

Partnerships in which public funds for social services are allocated to privately run programs are often seen as a semi-libertarian solution to the problem of the welfare state. But in religious or secular guise, such entanglements pose thorny problems. Taxpayers can be forced to subsidize religiously or ideologically driven programs they find objectionable; private groups can be compelled to compromise their beliefs and their mission.

What's more, the government gets to decide which private organizations and which beliefs will receive its imprimatur. Suddenly, the privatization of the welfare state looks more like the bureaucratization of charity. ■

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Rant: Jeff A. Taylor

Boomer or Bust

Reflections of a generational refugee

It has taken 40 years for me to come to the conclusion that if you are born a baby boomer you are pretty much destined to die one too. You can't escape them. I know; I've tried.

Acting half your age doesn't work—the boomers patented the whole forever young thing. Besides, it is tiring as hell and annoys your wife. Coming into the world at the absolute ass-end of the boom in December 1964 closes off the acting-older escape route too, as there is no shortage of 55-year-old boomers waiting to suck the life out of you with golf, stock tips, and the time they saw the Stones.

It is not enough that by sheer force of numbers this generation has kept America's politics and popular culture boomer-centric for decades. There's that recurring boomer exceptionalism – most, best, only – that often muscles its way to the front.

In their book *Generations*, William Strauss and Neil Howe took this constant refrain of "we're special" to actually mean something besides bad parenting. Strauss and Howe declared the boomers' strident tendency to declare from on high the goals and wants of society to be the defining characteristic of the generation. Prompt howls of indignation from boomers demonstrated a moralizing busybodiness that has given rise to one movement for "change" after another.

Yet millions of boomers, each declaring he or she had discovered the best way to live and work and pray and play, did have profound consequences – just not the intended ones. As the *Team America* soundtrack puts it: "America! Fuck Yeah! Freedom is the only way, yeah." The net effect of all the boomer striving was to increase personal freedom and possibilities, not in any one direction, but in many, sometimes contradictory ones. Turns out *freedoms* were the only way, yeah.

What started as an effort to build a counterculture soon fragmented into many niche subcultures that had nothing to do with (or even hated) flower power. That continued with succeeding generations to the point that today, with a big boost from technology, the average American can burrow deep into one comforting culture and/or surf across dozens with equal ease.

Yet history will show that, for all their organizing skill and moral sensitivities, the boomers took a pass on changing one hellish state policy. Boomers have collaborated and shamelessly switched sides in the War on Drugs, with full knowledge of the repercussions. If the greatest generation had landed at Omaha Beach, pissed themselves, tossed their weapons into the sea, and begged to serve as Nazi slop boys, then you might have an equivalent act of mass cowardice.

One glimmer of hope here is that, as the War on Terror follows down the same domestic path as the War on Drugs, any new, deal-killing restrictions on personal freedom can clearly be seen to have their roots in the drug war. Overseas, as America's rebuilding effort in Afghanistan will demonstrate in the coming years, it should become abundantly clear you cannot fight both drugs and terror. Pick one and you might win.

Meanwhile, boomer self-absorption is finally generating a little movement on the Social Security front, where the need for reform has been clear for 20 years now. Fear that the program might go poof for boomers may spur enough political will to do something other than prop up the Ponzi scheme. Or boomer exceptionalism may demand even more goodies from future generations, along the lines of the new Medicare drug benefit. We're special—pay up.

Quite a bundle of contradictions, these boomers. The last generation raised on a unified, mass popular culture is doomed always to try to rebuild one, only to produce the tools that make mass culture impossible. The generation obsessed with social justice, except when it counts. And if that sounds like more boomer exceptionalist bullshit, so be it. We're tricky old farts. ■

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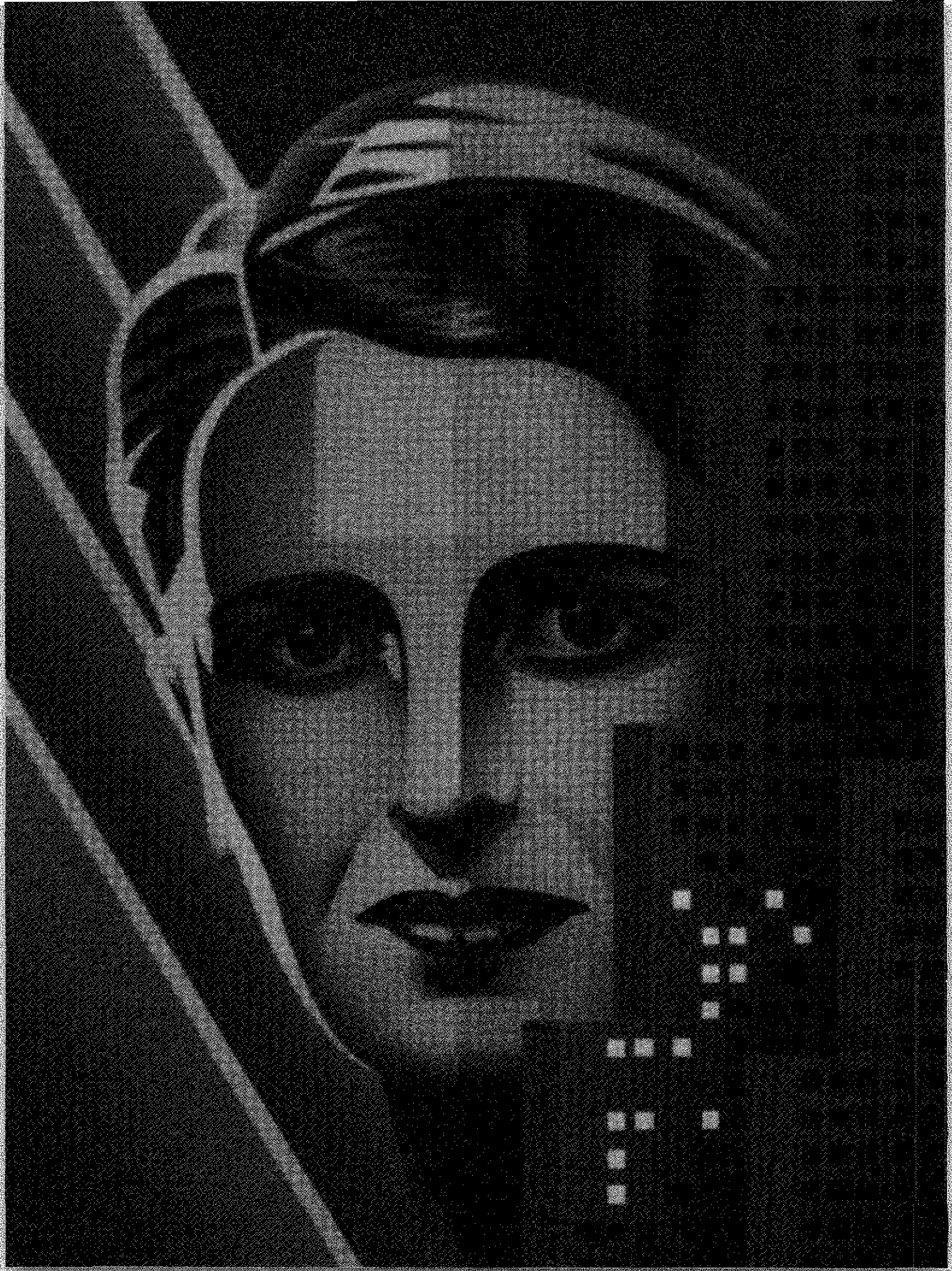

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Ayn Rand at 100

Loved, hated, and always controversial, the best-selling author of *The Fountainhead* and *Atlas Shrugged* is more relevant than ever.

Cathy Young

A HUNDRED YEARS after her birth and nearly 25 years after her death, Ayn Rand remains a fascinating and enigmatic presence. She has been "mainstreamed" enough to have been honored by a U.S. Postal Service stamp in 1999 and to have been featured on C-SPAN's *American Writers* series in 2002. Her novels figure prominently in readers' lists of the 20th century's greatest books. Notably, in a 1991 survey of more than 2,000 Book-of-the-Month Club members about books that made a difference in their lives, Rand's magnum opus, *Atlas Shrugged*, came in second—albeit a very distant second—to the Bible. Rand, a devout atheist, might have seen that as an insult rather than an honor.

Yet in many ways Rand remains an outlier and an oddity on the cultural scene, a cult figure with plenty of worshippers and plenty of desecrators. No other modern author has had such extravagant claims of greatness made

Painting of Ayn Rand by Nicholas used for postage stamp. © Getty Images/Mark Wilson

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Rand's rejection of the moral code that condemns selfishness as the ultimate evil and holds up self-sacrifice as the ultimate good is a radical challenge to received wisdom, an invitation to a startlingly new way to see the world.

on her behalf: Followers of her philosophy, Objectivism, regard her as the greatest thinker to have graced this earth since Aristotle and the greatest writer of all time. Mainstream intellectuals tend to dismiss her as a writer of glorified pulp fiction and a pseudo-philosophical quack with an appeal for impressionable teens. Politically, too, Rand is an outsider: Liberals shrink from her defiant pro-capitalist stance, conservatives from her militant atheism, and conservatives and liberals alike from her individualism. Libertarianism, the movement most closely connected to Rand's ideas, is less an offspring than a rebel stepchild. In her insistence that political philosophy must be based on a proper epistemology, she rejected the libertarian movement, which embraced a wide variety of reasons for advocating free markets and free minds, as among her enemies.

In recent years, at last, some analysis of Rand has appeared that is neither uncritical adulation nor unrelenting bashing. Some of it has come from unorthodox neo-Objectivists, such as the feminist scholar Mimi Gladstein or the political philosopher Chris Matthew Sciabarra. (The two edited the 1999 book *Feminist Interpretations of Ayn Rand*, and Sciabarra wrote 1996's controversial *Ayn Rand: The Russian Radical*.) The five-year-old *Journal of Ayn Rand Studies*, co-founded by Sciabarra, often features essays by mainstream intellectuals that treat Rand's legacy in a non-hagiographic way. Two controversial books about Rand the person remain a good place to start for an understanding, but not adulatory, look at her life and work: *The Passion of Ayn Rand* (1986) by Barbara Branden, no doubt the first-ever sympathetic biography whose subject slept with the biographer's husband, and *Judgment Day: My Years With Ayn Rand* (1989) by Nathaniel Branden, the husband in question.

In 1962, when they were still among the faithful, the Brandens co-wrote a book called *Who Is Ayn Rand?* More than 40 years later, the question still stands.

The Appeal of Ayn Rand

Reading Rand's philosophy can be an exhilarating, head-turning experience; it was for me when I first picked up her nonfiction manifesto *For the New Intellectual* at the age of 19, two years after coming to the United States from the Soviet Union. (Rand herself was an American immigrant from the Soviet Union, leaving her family behind to move here in 1926.) Rand's rejection of the moral code that condemns selfishness as the ultimate evil and holds up self-sacrifice as the ultimate good is a radical challenge to received wisdom, an invitation to a startlingly new way to see the world. While Rand was hardly the first philosopher to advocate an ethos of individualism, reason, and self-interest, no one formulated it as accessibly or persuasively as she did—or as passionately. In Rand's hands, the "virtue of selfishness" was not a dry, abstract rationalist construct with a bloodless "economic man" at its center. It became a bold, ardent vision of defiance, struggle, creative achievement, joy, and romantic love. That vibrancy, more than anything else, accounts for her extraordinary appeal.

Politically, Rand wanted to provide liberal capitalism with a moral foundation, to take on the prevalent notion that communism was a noble if unworkable idea while the free market was a necessary evil best suited to flawed human nature. In this she succeeded brilliantly (even if the notion that socialism failed because it has never been properly tried is still alive and well among the intelligentsia). Her arguments against "compassionate" redistribution—and persecution—of wealth have lost none of their power in the decades after they were made.

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Yet there is a reason Objectivism remains, for most people, a way station on a journey to some wider outlook. Even Nathaniel Branden, who still espouses most Objectivist tenets, has been severely critical of Rand's judgmental and contemptuous attitude toward all emotions she deemed "irrational," her tendency to glorify emotional repression, and her lukewarm support even for voluntary, non-self-sacrificing mutual aid.

The Limits of Ayn Rand

Perhaps Rand's biggest error was the totalism of her philosophy. Having rightly concluded that the values of the free market were moral, she went on to make the sweeping assertion that those values were the *only* moral ones, and that all human relations must be based on the principles of "trade." Yet there is nothing unreasonable and nothing anti-market or anti-individualist to the belief that individualistic and market-based values need something to complement them.

The Victorians emphasized the importance of charity and viewed family and community as "havens in a heartless world." This value system had its serious drawbacks—from preachy sentimentalism to fairly rigid gender roles, with women virtually excluded from economic and intellectual endeavors and relegated to the complementary sphere of love, care giving, and charity. But at least the Victorians recognized the need for a balance and variety of virtues.

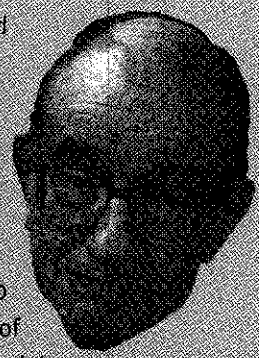
Politically, too, Rand's insistence on de-emphasizing, or even denigrating, family, community, and private charity is not a particularly clever tactic for capitalism's defenders. These are the very institutions that can be expected, in the absence of a massive welfare state, to meet those human needs that people prove unable to satisfy through the market. Rand did claim to be in favor of "benevolence," in contrast to altruism; but it would be fruitless to look for providers of private charitable aid among her "good guys," except for those who lend a helping hand to a friend. When charity is mentioned in Rand's fiction, it is nearly always in a negative context. In *The Fountainhead*, the chorus of "second-handers" eager to condemn her heroic, individualist architect

Rand-O-Rama

Ayn Rand's long shelf life in American culture

"This is the only novel of ideas written by an American woman that I can recall....Nothing she has to say is said in a second-rate fashion. You have to think of *The Magic Mountain*...when you think of *The Fountainhead*." **—Lorine Pruette, *The New York Times Book Review* (1943)**

"From almost any page of *Atlas Shrugged*, a voice can be heard, from painful necessity, commanding: 'To the gas chambers—go!'....A tornado might feel this way, or Carrie [sic] Nation." **—Whittaker Chambers, *National Review* (1957)**



"*Atlas Shrugged* is a celebration of life and happiness. Justice is unrelenting. Creative individuals and undeviating purpose and rationality achieve joy and fulfillment. Parasites who persistently avoid either purpose or reason perish as they should. [The *New York Times* reviewer] suspiciously wonders 'about a person who sustains such a mood through the writing of 1,168 pages and some fourteen years of work.' This reader wonders about a person who finds unrelenting justice personally disturbing." **—Alan Greenspan, future chairman of the Federal Reserve, responding to a negative review of *Atlas Shrugged*, in *The New York Times* (1957)**

"It's all *great*, Hef! Except...do you *really think* our readers will dig a nude fold-out of *Ayn Rand*?" **—"Hefner and His Pals," a comic strip in *Mad* magazine (1967)**

"Like most of my contemporaries, I first read *The Fountainhead* when I was 18 years old. I loved it. I too missed the point. I thought it was a book about a strong-willed architect...and his love life....I deliberately skipped over all the passages about egoism and altruism. And I spent the next year hoping I would meet a gaunt, orange-haired architect who would rape me. Or failing that, an architect who would rape me. Or failing that, an architect. I am certain that *The Fountainhead* did a great deal more for architects than *Architectural Forum* ever dreamed." **—Nora Ephron, *The New York Times Book Review* (1968)**

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Rand's philosophy would work well if human beings were never helpless and dependent through no fault of their own. Thus, it's hardly surprising that so many people become infatuated with Objectivism as teenagers and "grow out of it" later.

protagonist, Howard Roark, include "the society woman dressing for a charity bazaar" who uses charity as an excuse to flaunt her virtue; in *Atlas Shrugged*, a club providing shelter to needy young women is mocked for offering help to unworthy sufferers such as drinkers, dope users, and unwed mothers-to-be.

Family fares even worse in Rand's universe. The virtual absence of children in her work has been noted by many critics, starting with Whittaker Chambers in his infamous roasting of *Atlas Shrugged* in *National Review*. Actually, John Galt's private utopia in *Atlas* features a nameless young woman who makes it her career to raise rational children; but this brief passage comes across as little more than a pro forma nod to motherhood. In her 1964 *Playboy* interview Rand flatly declared that it was "immoral" to place family ties and friendship above productive work; in her fiction, family life is depicted as a stifling, soul-killing, mainly feminine swamp.

It's noteworthy that in *The Fountainhead*, the heroes—Roark, newspaper magnate Gail Wynand, and Roark's troubled lover, Dominique Francon—have all grown up motherless, while the arch-villain, critic Ellsworth Toohey, spent his childhood as his mother's pet and the worthless Peter Keating, who relies on Roark to do his architecture work, has a grotesque caricature of a "selfless," smothering, tyrannical mother. The only Randian heroic couple to actually reproduce is the hero of *Anthem* and his girlfriend, who is pregnant at the end of the dystopian science fiction novelette; but they have the excuse of needing to breed a new race of free men, since the world around them has regressed to post-apocalyptic primitivism and slavery.

In its pure form, Rand's philosophy would work very well indeed if human beings were never helpless and dependent through no fault of their own. Thus, it's hardly surprising that so many people become infatuated with Objectivism as teenagers and "grow out of it" later, when concerns of family, children, and old age—their own and their families'—make that fantasy seem more and more impossible.

The Darkness in Ayn Rand

In the heyday of the Objectivist movement, Rand used to brush off charges that her *Übermensch* heroes were unrealistic by pointing to herself and the Brandens, at one point shouting during a debate, "Am I impossible?" In fact, what is revealed of Rand in the Brandens' biographies dramatically illustrates the gap between ideology and reality in her own life. In the Randiverse, a man whose beloved left him for another would manfully accept her rational decision—may the best *Übermensch* win!—and remain friends with her and her new partner. In real life, Rand's "rational" affair with Branden, whom she fantasized as a Galt or Roark come alive, caused devastation all around, to themselves as much as to their spouses. Rand's unshakable belief in the power of the human mind led her to refuse to recognize the mental deterioration of her husband, Frank O'Connor, and she tormented him with exercises in "psycho-epistemology." When she herself was diagnosed with cancer, she refused to disclose her illness publicly, evidently because she believed, according to Barbara Branden, that cancer was the result of philosophical and psychological errors.

Rand's detractors often brand her a fascist. She is not, of course; but does her work have overtones of a totalitarian or dictatorial mentality? This charge irks even ambivalent Rand admirers, such as Nathaniel Branden, who fully recognize the dogmatism and intolerance in the

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Objectivist movement. They point out that Rand decisively rejects the use of force except in self-defense. True; but as Branden has observed on the topic of emotional repression, it would be wise to pay attention not just to what Rand says but to what she does—in this case, in her novels. Near the end of *Atlas Shrugged*, when the heroes go to rescue John Galt from the baddies, female railroad magnate Dagny Taggart calmly and quite unnecessarily shoots a guard who can't decide whether to let her in or not. The man, you see, "wanted to exist without the responsibility of consciousness"—obviously a capital crime.

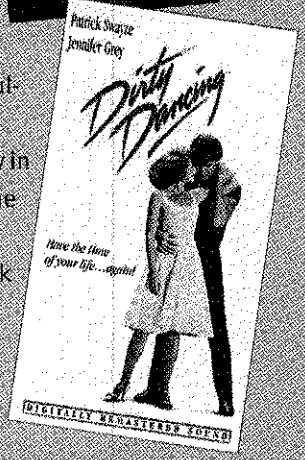
Still more troubling is an earlier passage in *Atlas* in which bureaucratic incompetence and arrogance lead to a terrible train wreck. Many would say, Rand wryly notes, that the people who died in the accident "were not guilty or responsible for the thing that happened to them." Then, in a series of brief portraits, Rand endeavors to show that the passengers were guilty indeed: All of them had benefited from evil government programs, promoted evil political or philosophical ideas, or both. Rand does not advocate their murder, of course (though she sympathetically depicts a trainmaster who chooses not to avert the disaster, partly in revenge against the regulators); but she does suggest that they had it coming. In *Atlas* and the nonfiction essays she turned to in her final decades, political and ideological debates are treated as wars with no innocent bystanders, and the dehumanization of "the enemy" reaches levels reminiscent of communist or fascist propaganda.

One inevitable consequence of this attitude toward most other human beings is, to quote the title of a George Orwell essay, "the prevention of literature." There can be no question that Rand was a highly talented writer with a great gift for plot, description, and yes, characterization. *The Fountainhead* is a brilliant book, and so is Rand's often underappreciated first novel, *We the Living*, a richly textured, passionate, moving story of life in post-revolutionary Russia.

But in these novels Rand's philosophy has not yet petrified into dogma. Even the larger-than-life romantic heroes have recognizable human

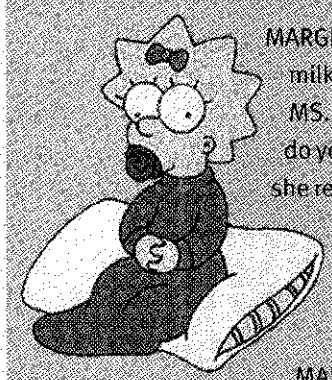
"He spent several days deciding on the artifacts [that would be found with his dead body]....He would be found lying on his back, on his bed, with a copy of Ayn Rand's *The Fountainhead* (which would prove he had been a misunderstood superman rejected by the masses and so, in a sense, murdered by his scorn) and an unfinished letter to Exxon protesting the cancellation of his gas credit card." **—Philip K. Dick, *A Scanner Darkly* (1977)**

"With acknowledgement to the genius of Ayn Rand" **—liner notes to the Rush album *2112* (1976)**



JENNIFER GREY: You can't just leave [the girl you impregnated].
MAX CANTOR: I could blow a summer hauling toasted bagels just to bail out some little chick who probably balled every guy in the place....Some people count, and some people don't. [pulls *The Fountainhead* from his pocket] Read it. I think it's a book you'll enjoy. But be sure you return it—I have notes in the margin. **—*Dirty Dancing*, 1987**

"Lots of girls fell in love with Definitism because of the erotic power of the books. No one wanted to admit how important the sex was, but let's face it—the books were very erotic. There were all these intrigues going on, all these little girls wanting to satisfy their sexual cravings." **—Mary Gaitskill, *Two Girls, Fat and Thin* (1991)**



MARGE: Maggie...likes a bottle of warm milk before nap time.
MS. SINCLAIR: A bottle? Mrs. Simpson, do you know what a baby's saying when she reaches for a bottle?
MARGE: "Ba Ba?"
MS. SINCLAIR: She's saying "I am a leech!" Our aim here is to develop the bottle within.
MARGE: That sounds awfully harsh.
—conversation between Marge and the proprietor of the Ayn Rand School for Tots, *The Simpsons* (1992)

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Rand can be seen as a great eccentric thinker and writer whose work is less about a practical guide to real life than about a unique, individual, stylized vision, a romantic vision that transforms and transcends real life.

emotions. (Rand's detractors often claim that Roark is a robotically unfeeling superman, but consider this passage, when Dominique tells him of her marriage to Peter Keating: "It would have been easy, if she had seen a man distorting his mouth to bite off sound, closing his fists and twisting them in defense against himself. But it was not easy, because she did not see him doing this, yet knew that this was being done, without the relief of a physical gesture.") Rand's moral scale in *The Fountainhead* still allows for shades of gray. The power-seeking Gail Wynand is a tragic figure whom Roark loves despite the error of his ways; Dominique's father, Guy Francon, is basically a good guy despite exemplifying none of the Randian virtues; even the despicable Peter Keating merits some sympathy, and his failed romance with his true love, Katie, has some dignity and poignancy.

But in *Atlas Shrugged*, Rand's final novel, the ideologue crushes the writer almost completely. While a few characters show occasional glimpses of humanity, most of the heroes are abstractions of greatness, while the villains are subhuman vermin. The story suffocates under endless speechifying and analysis in which each point is flogged to death and each un-Randian idea is reduced to a straw man the heroes can easily beat down and shred. In this effort, all life and beauty are drained from Rand's prose style, and we are treated to passages like this one, when industrialist Hank Rearden's wife tries to hurt him by telling him she has slept with a man he despises: "There, he thought, was the final abortion of the creed of collective interdependence, the creed of non-identity, non-property, non-fact: the belief that the moral stature of one is at the mercy of the action of another."

The Paradox of Ayn Rand

For all her flaws, Rand remains a towering figure on the last century's cultural landscape. She arose in an era of competing totalitarian ideologies and declared that communism and Nazism were not opposites but evil twins, and that their true opposite was freedom. In an era when collectivism was seen as the way of the future, she unapologetically asserted the worth of the individual and his right to exist for himself, and declared the spiritual dimension of material achievement. In an age of existential doubt, she offered a celebration of creativity, of the human mind, of the joy of life on this earth. (*The Fountainhead* has a glorious passage in which a young man who is starting to despair of finding beauty or purpose in life is moved and inspired by the sight of Roark's just-finished construction project.) *Atlas Shrugged*, clunky and extremist though it is, contains some brilliant and powerful pro-capitalist polemics—such as Francisco D'Anconia's speech on the meaning of money and the tale of one factory's disastrous experiment in implementing the slogan, "From each according to his ability, to each according to his need."

Rand zealots, and even moderate fans such as the Brandens, are often prone to credit her with almost single-handedly rolling back the tide of socialist ideology in the 20th century. That's quite an exaggeration, as is the notion that her philosophy sprang whole from her mind like Athena from the skull of Zeus. Still, Rand was the most successful and widely read popularizer of the ideas of individual liberty and the free market of her day. In the 21st century, as we face Islamist terrorism abroad and when public discourse at home often seems dominated by religious conservatism on the right and politically correct pieties on the left, Rand's message of reason and liberty, if it's stripped of its odder

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features, could be a rallying point for what the neo-Objectivist philosopher David Kelley, who runs the Objectivist Center, calls "Enlightenment-based values."

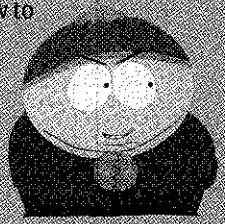
From yet another perspective, Rand can be seen as a great eccentric thinker and writer whose work is less about a practical guide to real life than about a unique, individual, stylized vision, a romantic vision that transforms and transcends real life. Rand's philosophy admitted no contradictions or paradoxes in reality; but reality is full of apparently irreconcilable truths. The truth of what Rand said about the heroic human spirit and individual self-determination does not negate the truth that human beings often find themselves at the mercy of circumstances beyond their control and dependent on others through no fault of theirs. The truth of the self-sufficient soul coexists with the truth of the vital importance of human connections.

Rand herself was a creature of paradox. She was a prophet of freedom and individualism who tolerated no disobedience or independent thought in her acolytes, a rationalist who refused to debate her views. She was an atheist whose worship of Man led her to see the human mind as a godlike entity, impervious to the failings of the body or to environmental influences. (Nathaniel Branden reports that she even disliked the idea of evolution.) She was a strong woman who created independent heroines yet saw sexual submission as the essence of femininity and argued that no healthy woman would want to be president of the United States because it would put her above all men.

This is perhaps how Rand is best appreciated: as a figure of great achievement and great contradictions, a visionary whose vision is one among many, whose truths are important but by no means exclusive. Rand, it is safe to say, would have regarded such appreciation as far worse than outright rejection. But that's just another paradox of life. ■

Contributing Editor Cathy Young (CathyYoung63@aol.com) is a columnist for the Boston Globe.

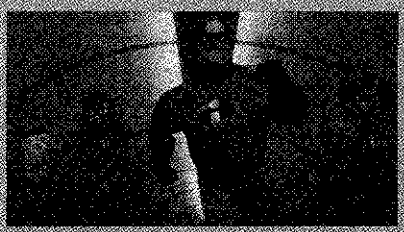
LOUIS: I could have you arrested you... creep. They'd think I put you in jail for beating me up.
JOE: I never hit anyone before, I...
LOUIS: But it'd really be for those decisions. It was like a sex scene in an Ayn Rand novel, huh?
JOE: I hurt you! I'm sorry, Louis. I never hit anyone before, I...
—from *Angels in America*, by Tony Kushner, conversation between lovers (1992)



"Yes, at first I was happy to be learning how to read. It seemed exciting and magical, but then I read this: *Atlas Shrugged*, by Ayn Rand. I read every last word of this garbage, and because of this piece of shit, I am never reading again." **—police officer Barbrady, *South Park* (1998)**

"However completely you think you preside over your own schedule, there *are* inflexibilities there. Inflexibilities which not even one of Ayn Rand's heroes could do very much about." **—William F. Buckley Jr., *Miles Gone By: A Literary Autobiography* (2004)**

"Unlike...any other Marvel [Comics] author, [Spider-Man co-creator Steve] Ditko received plotting credit as early as *Amazing Spider-Man* #25 (1965), an unprecedented concession that was most likely the result of Ditko's contemporaneous discovery of Ayn Rand's Objectivism, with its hatred of creative dilution and unearned rewards." **—Andrew Hultkrans in *Give Our Regards to the Atom Smashers!: Writers on Comics* (2004)**



"*The Incredibles*...suggests a thorough, feverish immersion in both the history of American comic books and the philosophy of Ayn Rand....Luckily, though, [writer and director Brad] Bird's disdain for mediocrity is not simply ventriloquized through his characters, but is manifest in his meticulous, fiercely coherent approach to animation." **—A.O. Scott, *The New York Times* (2004)**

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The Born-Again Individualist

Fox News Channel's Judge Andrew Napolitano on lying cops, out-of-control government, and his bestselling new book, *Constitutional Chaos*

Interviewed by Nick Gillespie

As THE HIGHLY rated home to the likes of Abu Ghraib apologist Sean Hannity and the document-shredding constitutional scholar Oliver North, the Fox News Channel is about the last place you think of when it comes to quaint values such as due process, defendants' rights, and restrained government. Yet Fox is home to television's fiercest defender of civil liberties, Judge Andrew Napolitano, the network's senior judicial analyst and a regular on *The Big Story With John Gibson, Fox and Friends, The O'Reilly Factor,* and other programs. The 54-year-old Napolitano, the youngest life-tenured Superior Court judge in New Jersey history, is an eloquent and outspoken critic of government abuse of power, whether the topic is widespread "testilying" by cops, eminent domain abuse by local and state officials, or the unilateral detention of suspects at Guantanamo Bay.

To get a sense of the judge's commitment to principle, consider this representative exchange between Napolitano and Fox's Tony Snow on a December installment of *The O'Reilly Factor*. The topic: the State Department's restrictions on the Hezbollah-owned Al-Manar TV.

Snow: Even Supreme Court cases that try to protect the right to say controversial things say that if there's direct incitement [to violence], there can be reason [to ban speech].

If you say to somebody, "Go kill him," and there's an anticipation that somebody's going to do it, that's not legal.

Constitutional Chaos (cover detail)

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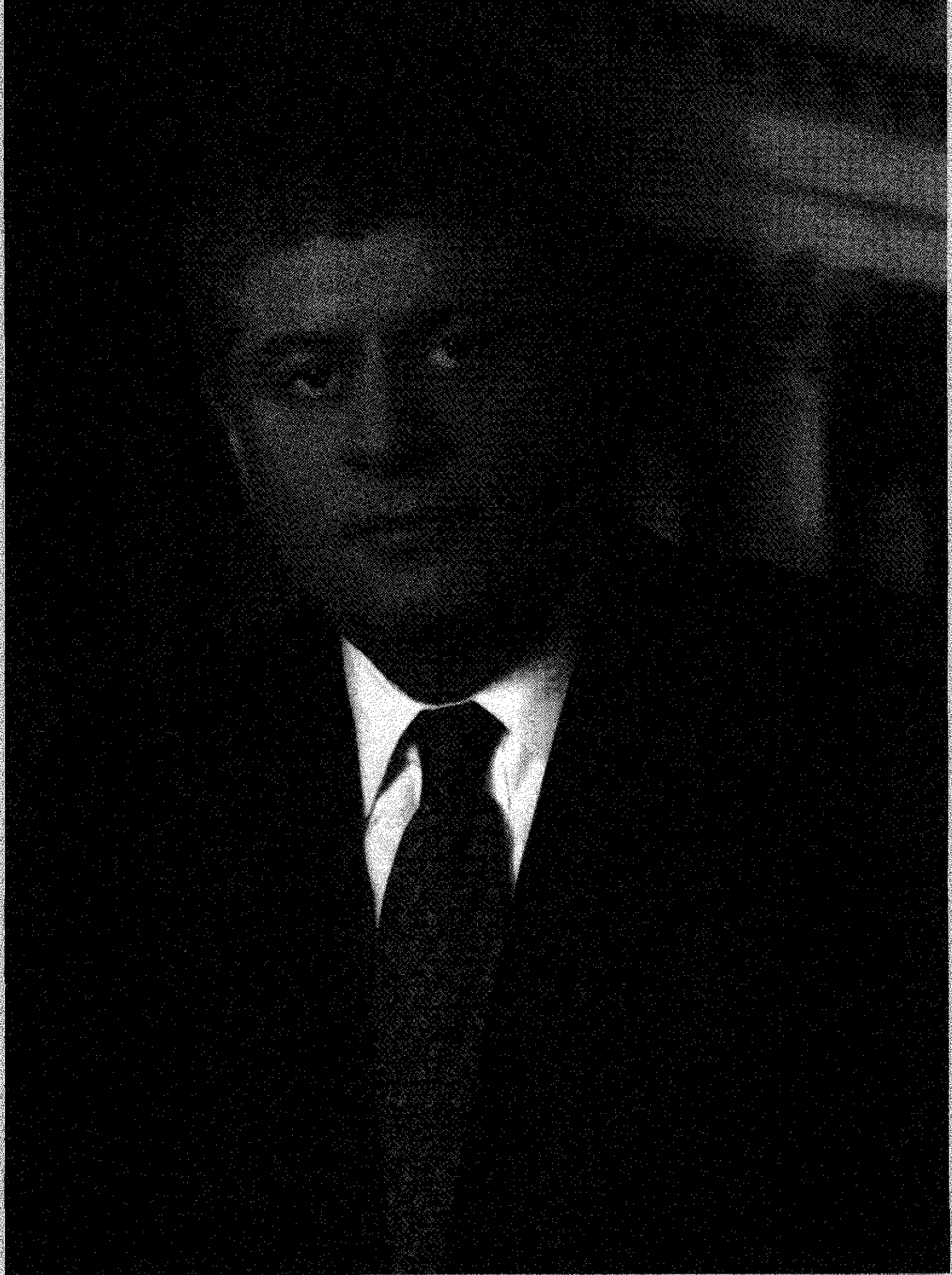

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Napolitano: This is speech, pure and simple...Here's the law. Here's what is legal. *All speech is absolutely protected, no matter what it says, when there is time for more speech to rebut it.* The First Amendment presumes that we rational adults, Americans, will decide what we want to watch on television and read and listen to.

Napolitano's introduction to political power run amok occurred in high school, when he worked as a summer page for Rep. Peter Rodino (D-N.J.), who gained national fame for his work in bringing Richard Nixon to account during Watergate. Educated at Princeton University and Notre Dame Law School (where he took a particular interest in natural law theory), the never-married Napolitano has taught at Seton Hall, practiced law, and served as vice president and general counsel of Hackensack University Medical Center. After working with Fox President Roger Ailes at CNBC, he went over to his current network in 1998.

He is the author of the new book *Constitutional Chaos: What Happens When the Government Breaks Its Own Laws* (Nelson Books), currently perched near the top of Amazon's ratings. It is a sweeping, relentless, and eminently readable indictment of the reckless disregard for individual rights exhibited by law enforcement, elected officials, and the nation's courts. As compelling, it describes Napolitano's personal odyssey from his days of supporting Richard Nixon to becoming a "born-again individualist" after eight years on the Garden State bench, which he left in 1995. Dedicated to Thomas More, the great patron of speaking truth to power, it should be required reading in post-9/11 America.

A frequent presence on the nation's op-ed pages (and an occasional contributor to **reason online**) and an even more dynamic, animated presence in person than on the small screen, Napolitano sat down to talk with Editor-in-Chief Nick Gillespie in December at Fox News' Washington, D.C., offices.

reason: Your book is called *Constitutional Chaos*. What do you mean by that term?

Andrew P. Napolitano: The full title is *Constitutional Chaos: What Happens When the Government Breaks Its Own Laws*. We are in a fit of constitutional chaos when the government views constitutional guarantees as discretionary. As Americans, we order our lives on the belief that we have extraordinary freedoms. We believe those freedoms don't come from the government. They come from our humanity. The government doesn't *give* freedom; the government under the Constitution is restrained from *interfering* with it. I can basically say whatever I want about the government. I can basically travel wherever I want to go. I can basically worship however I see fit. If the government comes to the view that those freedoms are discretionary, no matter how noble the stated [reason to restrict them] may be, then we're in a state of constitutional chaos. We will not be able to order our lives based on freedom. We won't know who will be prosecuted or who'll just be swept away.

reason: So where's the trouble?

Napolitano: Chaos in our criminal justice system comes about when the government acts as if it is entitled to a free pass on enforcing the laws. When people who work for the government, whether they're traffic cops or FBI agents, prosecutors or bureaucrats, act with the self-confidence that they are not obliged to obey the law—

reason: Give me a quick example of that.

Napolitano: I am walking out of Mass one day in Washington Square Park in lower Manhattan, and a scruffy guy with some others like him comes up to me and offers me marijuana. I tell him to take a hike. He turns over the collar of his jacket and shows me his New York Police Department detective badge and says, "Have

"No one can point to a single incident where national security was impaired because someone insisted on their right to free speech or their right to privacy or their right to due process."

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a nice day, Your Honor," so obviously he [and his fellow undercover cops knew who I was]. What were they doing? Selling drugs. Now, there's no exception in the statute. They wanted me to buy drugs (which don't tempt me at all, even though I believe that they should be legal). Their chances of hitting on me were none and none. They just recognized me coming out of Mass, but they were committing a crime in an effort to enforce the law. Selling drugs and attempting to sell drugs in the presence of children, mind you. When the government breaks the law in order to enforce the law, it perverts the process. It becomes a law unto itself. It encourages others to become a law unto themselves, and it becomes a precedent for the government to do that again and again and again.

The government routinely bribes witnesses by giving them something of value in order to influence the witness's testimony. It could be paying the witness's bills—alimony, rent, or mortgage. It could be a direct cash payment to the witness. It could be, and this is the most typical way, forgiving the witness a crime he has committed. When the government does that, it perverts the intellectual integrity of the trial process. It no longer becomes a search for truth. This tactic is of a post–World War II vintage. It is now taught in law schools as well as specialized schools for prosecutors that the government runs.

The government does that for two reasons. One, I think it honestly believes, and there's a lot of data to support this, that if you cut the head off [of a criminal enterprise], you're going to destroy the organization. The second is that a lot of prosecutors are interested in victory, not truth, and they're interested in a high-profile victory because it enhances their own careers and their own standing in the law enforcement community.

One of the most extreme examples involves Sammy "The Bull" Gravano. He testifies against mobster John Gotti. Sammy admits to 19 murders. *Nineteen!* Gotti is charged with *conspiracy* to commit *one*. The government forgives 19 of Sammy's in order to get him to say what the government wants him to say about Gotti. How do we know that he was telling the truth? His incentive to please those who are bribing him is an absolutely irresistible temptation to be forgiven 19 murders and to wipe the slate clean.

reason: That story has a really happy ending, too, right?

Napolitano: Gotti's convicted, and he dies in jail. Gravano enters and then leaves the witness relocation program and goes back to a life of crime. He imports Ecstasy from the Middle East, and he's now serving 20 years. He couldn't take freedom.

reason: I hate to harp on cases involving Italians, Judge, especially since my mother's maiden name was Guida. But let's talk about the Philly mobster Little Nicky Scarfo.

Napolitano: The government devised a way to insert software into Little Nicky's laptop computer that would record every keystroke he made. Generally, if the government is interested in some document in that computer that it believes is evidence of a crime, it can go to a federal judge, present its evidence—we call it "probable cause"—and get a search warrant. That wasn't good enough for the government. The government wanted to capture every one of Nicky's thoughts on everything, every single keystroke. So the government persuaded a federal magistrate to issue a warrant for that. Then it devised this software and persuaded the judge to allow the government to break into his home and make it look like a robbery. They break in. They put the software in his laptop. He comes home. He calls the local police. The FBI has not told the local police, so everybody thinks it's a break-in.

Ultimately, of course, it develops that they have recorded all of his keystrokes. They now say to him, "Look at what we've got on you. Spill the beans or we'll spill all of this." Nicky had some pretty bright lawyers that said, "Hmmm, how'd you get that information? We'll spill the beans on this new software." The government recoiled and said you can't reveal the software because of "national security." He eventually pleaded guilty to a low-level crime. It was a deal that the government cut. They didn't realize that by doing this to Nicky they would expose this means of law enforcement—burglary and seizing a lot more than any search warrant constitutionally could offer.

The idea of the government capturing every thought of a person, no matter how nefarious, is specifically condemned by the Fourth Amendment, which says you've got to ask for a specific item. There is no statute or case law or constitutional principle that would contemplate or authorize what the government did here. And let me tell you, if they did it to Little Nicky Scarfo, they could do it to Little Nicky Gillespie.

reason: What's your case against the USA PATRIOT Act?

Napolitano: Let's put aside all of the procedural problems

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with enacting it. Forget about the fact that there was no debate. Forget about the fact that most members of Congress didn't even have an opportunity to read it. It is a direct assault on at least three amendments to the Constitution: the First Amendment, the Fourth Amendment, and the Fifth Amendment. The PATRIOT Act legitimates the notion that if we give up certain freedoms, the government will keep us safer. I reject that notion from a moral and legal point of view. I also reject it from a practical point of view. It doesn't work. The government doesn't need our freedoms to keep us safer. No one—no lawyer, judge, or historian—can point to a single incident in American history where national security was impaired because someone insisted on their right to free speech or their right to privacy or their right to due process.

The PATRIOT Act encourages what the government calls "national security letters"—basically, self-written search warrants. It violates the Fourth Amendment, which prohibits self-written search warrants. The PATRIOT Act and two of its predecessors, the Foreign Intelligence Security Act of 1977 [FISA] and the Electronic Privacy Act of 1986, authorized the government to obtain search warrants by bypassing [longstanding tradition in] the courts. Today an FBI agent investigating a person need only satisfy her or himself that the person under investigation is a threat to national security. The agent doesn't have to demonstrate evidence to a judge.

FISA began the notion of search warrants on less than probable cause. Prior to that, if the government wanted to search a place and look for a person or a thing, it had to go to a judge and persuade the judge that the thing sought is evidence of a crime, and the person who put the thing there, whether it's a document or contraband, more likely than not was involved in criminal activity. The fancy word for this is *probable cause*. There's judicial intervention moderating and tempering the government's desire. That's specifically laid out in the Fourth Amendment because of the Framers' revulsion at the king's soldiers going into their barns and through their papers and things with what were effectively self-written search warrants.

FISA did not authorize self-written search warrants, but it [created special courts that] authorized search warrants on less than probable cause. The theory was the people being searched for in these cases are foreign agents. If we find them, we won't prosecute them because we didn't have probable cause to get the warrant, but we'll kick them out of the country because they're a danger to us. Constitutionally, that made some sense. It actually respected the rights of those foreign agents and anybody else who might innocently have been caught up in the surveillance.

The '86 law took that one step further and said it's too easy for people electronically to transfer funds from one account to another. It's too easy for them to learn that we're on their trail, so we want to give the FBI the power to get financial information without going to the courts first. The '86 act authorized national security letters. They were limited to financial institutions, and the target had to be a foreigner. Not a foreign *agent* anymore, but anyone who was foreign or anyone involved in any organized criminal activity—mob-related activity, drug-related activity, or some involvement with a foreign country.

reason: And the national security letter merely says that I'm investigating this person on suspicion of criminal activity or that I want the records of this person. And because of national security reasons, you have to give me x, y, and z.

Napolitano: Correct. You simply serve this on the financial institution. The financial institution knows that they have to preserve the requested record. Under the Electronic Privacy Act, though, the financial institution could call the person whose bank account was being investigated and say: "We've got a subpoena, but it's unlike any subpoena we've ever seen before because it's not signed by a judge. We're going to honor it in 10 days. If you want to challenge it, challenge it." And you could still go to a judge and challenge it. It wouldn't be the judge who issued it because it wasn't issued by a judge, but you could go before a federal judge, and the government would have to justify the so-called national security letter.

Now comes the PATRIOT Act and the following additions: The recipient of the request cannot tell anyone about it, so the financial institution can't tell you it got this request. It must turn the information over immediately, and the FBI is not required any longer to demonstrate even in its own notes that the person that it's going after is a foreigner. It's anyone the FBI thinks may provide information about terrorism. The government is now permitted to violate the Fourth Amendment by writing its own search warrants. It is permitted to silence the recipient of the search war-

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rant, which violates the First Amendment. And by this silence, it de facto violates the Fifth Amendment, which guarantees you due process because due process means you can't have anything taken from you—a document, your wealth, or your freedom—without a trial.

It gets worse: Two-and-a-half years after the PATRIOT Act was signed, the Intelligence Authorization Act of 2004 is signed. It redefines the term *financial institution*. Under the rubric of "financial institution," it has included a tremendous number of [businesses] that are not financial institutions, upon which the government can now serve self-written search warrants. These include hotels, casinos, car dealers, jewelry stores, real estate offices, insurance agents, lawyers, bodegas, kiosks in a mall where you would buy a magazine or where you would wire money, and the post office.

reason: Is there any reason to believe the PATRIOT Act has helped keep us safe from terrorism?

Napolitano: We have not been attacked since 9/11. Who knows why? We wiped them out of Afghanistan. We inflicted enormous setbacks on them in Iraq. The government can take all the credit that it wants on the basis of the PATRIOT Act, but the government cannot point to a single successful prosecution for terrorist activity where the evidence obtained was under the PATRIOT Act—at least a successful prosecution that wasn't overturned eventually. The PATRIOT Act creates one new independent crime, the crime of speaking. The rest of the PATRIOT Act does not create substantive crimes. It gives tools, unconstitutional tools, to law enforcers. They have used those tools, but they haven't gotten a single prosecution for terrorist acts on the basis of it. They've gotten five prosecutions having to do with political corruption and drugs. One of the things that John Ashcroft gave to Congress in return for no debate was the sunset clause. The other was that the PATRIOT Act would only be used in the war on terror.

Both of those promises have been violated. We know from newspaper accounts that the PATRIOT Act was used to gather information on political corruption in Las Vegas and against drug dealers elsewhere. The Intelligence Reform Act of '04 gets rid of one of the sunset clauses.

reason: Let's talk about the evolution of your views. During your college years in the late '60s, you wore a "Bomb Hanoi" T-shirt and supported Richard Nixon's law and order campaign. You write that eight years on the bench as a superior court judge in New Jersey turned you into a "born-again individualist," and Fox News Channel viewers can see you regularly argue in favor of restrictions on cops and law enforcement more generally. How did serving on the bench change you?

Napolitano: I had a realization that many [law enforcement agents] were lying. Some of them would acknowledge, not to the extent that I would have them charged with perjury, but in the wink and the nod in a conversation with them afterwards, "Well, we almost don't care if you found out that we kicked in the taillight." "We knew," they'd suggest, "from the profile—Mercedes Benz, New York plates, African-American driver, coming off the George Washington Bridge—it was more likely than not that drugs were in there, and we don't even care." They took an oath to uphold the Constitution, and they're violating that oath when they violate the rights of the driver of that car.

I've always considered myself a Barry Goldwater Republican. I want the Democrats out of my pocketbook, and I want the Republicans out of my bedroom. I believe that the Constitution and the natural law

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mandate that the individual is greater than the state and that individual rights are the whole reason for our success in the Western world. Our cultural successes, our enjoyment of freedom, our financial successes, are all due to unleashing individual initiative and guarding and protecting individual liberty.

On many issues, I agree with conservative thought. It's not society that causes crimes; individuals cause crimes. I believe abortion is murder. I believe the Second Amendment protects an absolute right to keep and bear arms. I believe affirmative action based on race is an absolutely unconstitutional as well as immoral policy. I also believe that government is best which governs least and that the Constitution only gives 18 specific enumerated delegated powers to the federal government.

I believe that Congress and the president and the Supreme Court have grown to an unrecognizable point, where we now have members of Congress that think they can solve every problem under the sun. So Sen. John McCain [R-Ariz.], for whom I have a lot of respect, said to [New York Yankees owner] George Steinbrenner, "Don't you dare pay Jason Giambi, because we heard a rumor in a newspaper that he told a grand jury that he once used steroids, and if you do, we're going to make sure you can't." What are they going to outlaw next? The speed of Roger Clemens' fastball because it might hurt the batters' wrists? I mean, this is an attitude of Potomac fever that the government thinks we can legislate about and solve every crime and every problem.

reason: Let's talk about natural law and positivism. Sketch the two camps and why you believe what you do.

Napolitano: Scholars and lawyers and jurists and people interested in this have always debated what is the source of our rights. There are many, many schools of thought, but they basically fall into two categories. One says that our rights come by virtue of our humanity because we are created in God's image and likeness. Because God is perfectly free, he has instilled in us all the yearnings for freedom that we have: freedom of thought, freedom to develop one's personality, freedom to express oneself, freedom of movement, freedom of religion, freedom of association, etc. That school of thought is known as the natural law. Thomas Jefferson, who wrote the Declaration; James Madison, who wrote the Constitution; and virtually all the Founding Fathers, even though some were deists and some were atheists, they were to a person believers in the natural law.

The other school of thought is sometimes called positivism, sometimes called legal realism. It basically says that the law is whatever the lawgiver says it is. As long as the lawgiver follows its own rules, whatever it says is the law. So positivism would say the majority in a democracy always rules. There are no minority rights because there are no brakes on the majority will. If the majority wants to get rid of the First Amendment, the majority rules; there is no First Amendment. Therefore, there's no protection for freedom of speech. If the majority wants to take property belonging to person A and give it to person B because the majority rules, the majority can do that because, again, there are no natural rights that would allow person A to keep his property against the will of the government.

The attraction to positivism is it is pure democracy. The majority literally always rules. Or whoever is in power always rules. Positivism didn't rear its head successfully, in my view, until the administration of Franklin Delano Roosevelt, when we took a decided step toward a centralization of power in Washington and ultimately toward many socialistic programs that

"In terms of the government control of our lives, in terms of the percentage of our income that the government takes, in terms of the areas of human behavior we let the government regulate, we are infinitely less free."

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we now have because FDR was the ultimate positivist who believed whatever law he signed was a good law and there were no brakes on that.

[The FDR era] began, in my view, the dark part of American history where the federal government believed that it could solve any problem that was national in scope, irrespective of whether it was a *federal* problem. A *federal* problem is one arising under the 18 specific enumerated powers given to the federal government under the Constitution. A *national* problem is something that exists in New Jersey and California and Texas and Illinois. But just because it's national doesn't mean it's federal and therefore can be addressed by the federal government.

reason: You contrast natural law with positivism, which you defined as pure democracy, and you said the Constitution reflects a natural law mind-set. Yet under the Constitution, we can repeal the First Amendment. As a natural law advocate, you would not feel compelled to follow that law, would you?

Napolitano: Correct.

reason: So this helps to explain why you dedicate your book to Thomas More.

Napolitano: I dedicate the book to St. Thomas More and cite the most frequently quoted passage from *A Man for All Seasons*. More is basically saying everyone is entitled to due process, rights are not discretionary; and his son-in-law challenges him, saying, what about the rights of the devil? And More says, I would give the devil his due because when they come after me, I want them to give me my due. Every human is entitled to the protection of the law.

reason: You said we entered a dark period in American history.

Napolitano: We did in 1932.

reason: But wouldn't you agree that if we're talking about freedom of expression, people are much freer to express themselves now than they were in 1932? With or without the PATRIOT Act. For cultural and technological reasons, you can say whatever you want in a wider variety of contexts. You can disseminate information and points of view today that were unimaginable in 1932, a year in which you couldn't even legally publish *Ulysses* or *Lady Chatterley's Lover*. Something similar goes for lifestyle, too, and other parts of society.

Napolitano: In terms of the government control of our lives, in terms of the percentage of our income that the government takes from us, in terms of the types and the areas of human behavior we let the government regulate, we are infinitely less free. And as Jefferson once said, it is in the natural order of things that the government should be greater and human liberty lesser.

Women have much more freedom. African Americans have much more freedom. Gays have much more freedom. The discrimination that was rampant, and often caused by the government, 40 or 50 or 60 years ago—there's been progress in those areas. But the destruction of federalism, the centralization of power in Washington, the belief that Washington can regulate all aspects of our lives will, if not checked, lead us to a totalitarian form of government. Freedom is the power and ability to obey your own free will and conscience rather than the free wills and consciences of others.

reason: You said abortion is murder. Should it be regulated by the state or should it be prohibited by the state?

Napolitano: Absolutely it should be prohibited, just the way all unjust killings are prohibited.

reason: Should doctors go to prison as murderers?

Napolitano: Yes.

reason: First-degree murder?

Napolitano: Yes.

reason: Should they get the death penalty—

Napolitano: I don't believe that the state has the moral authority to execute, so I don't believe in the death penalty.

reason: But you do think that doctors who perform abortions should be put in jail as murderers? Every bit as much as Scott Peterson?

Napolitano: Yes. By a state government, not by the federal government, because the Constitution doesn't authorize the federal government to prosecute murderers. *Roe v. Wade* is wrong because there's isn't a scintilla in the Constitution or its history to justify federal legislation on abortion. It would then be up to the state of Kansas to allow it and Pennsylvania not to allow it.

reason: How do you feel about Bush's likely appointments to the Supreme Court?

Napolitano: I am optimistic about President Bush's appointments because I agree with some of the deep libertarian strains of his favorite justice, Justice Scalia. When the government told the court earlier this year that the president could lock up an American and throw away the key, that the military could take people to Guantanamo Bay and do what it wanted with them

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there because the Constitution didn't apply, the Court rejected those notions by a vote of 8 to 1. The strongest pro-liberty argument, the strongest argument against this extraconstitutional behavior, was written by the most conservative justice, Antonin Scalia. So there is hope, I think, that people of like mind [will be appointed to] the Court.

reason: Who would you like to see on the Supreme Court?

Napolitano: I would like to see people who believe that the Constitution means what it says and take rights seriously. Jay Michael Luttig is a judge in the United States Court of Appeals for the 4th Circuit, a former clerk for Justice Scalia. He believes the Fourth Amendment means what it says; the First Amendment means what it says.

reason: How do you feel about Alberto Gonzales as attorney general?

Napolitano: He will be the first attorney general in American history, publicly, to be in favor of torture. The others may have been in favor of it privately, but Al Gonzales is in favor of it publicly. This is an untenable position to take.

reason: What's your wish list for ending constitutional chaos?

Napolitano: First thing we should do is abolish the 16th Amendment. That would make the income tax unconstitutional, which is what it was until we enacted the 16th Amendment (even though we had two income taxes before then). That of course would starve much of the federal government out of existence.

reason: Well, that's not going to happen.

Napolitano: Not in your lifetime or mine, but it's on my wish list. I would change the third word of the Constitution from *people* to *states* because it was the states, not the people, who enacted the Constitution. And I would put the word *expressly* back in the 10th Amendment [before *delegated*], which is where it was until it was removed by a political maneuver before the final document was sent to the states for ratification. I would define the word *regulate* in the Interstate Commerce Clause in its true meaning, which is "to make regular," not to control every aspect of interstate commerce. In my world, the federal government would be dependent upon the states and excise taxes for its financial wherewithal. It would be limited in its scope to the 18 powers given to it by the Constitution. The states would legislate for the health, safety, welfare, and morality of the people. All government would be required to respect the natural rights of everyone.

reason: Besides Thomas More, who are your heroes?

Napolitano: I am a great admirer of the work of [Austrian economist] Ludwig von Mises. He was a true believer that the engine of freedom will make us safer, happier, more culturally admirable, and ultimately give us the freedom to go to heaven. I am a greater admirer of St. Josemaria Escriva de Balaguer, the founder of Opus Dei. He taught that any human being by his personal behavior can aspire to sainthood.

reason: What's the connection between your Catholicism and your politics? The church contributed hugely to the development of natural law theory. But historically, the church has also often been an extremely repressive, anti-democratic, anti-individualistic organization.

Napolitano: The Catholic Church teaches that every human life is of potentially infinite value, that it can be saved up to the moment of death, and that each soul could present everlasting and eternal glory to God, no matter how evil the person appears. That's about as strong a statement of the primacy of the individual over the state as you could imagine. ■

"Alberto Gonzales will be the first attorney general in American history, publicly, to be in favor of torture. The others may have been in favor of it privately, but Al Gonzales is in favor of it publicly."

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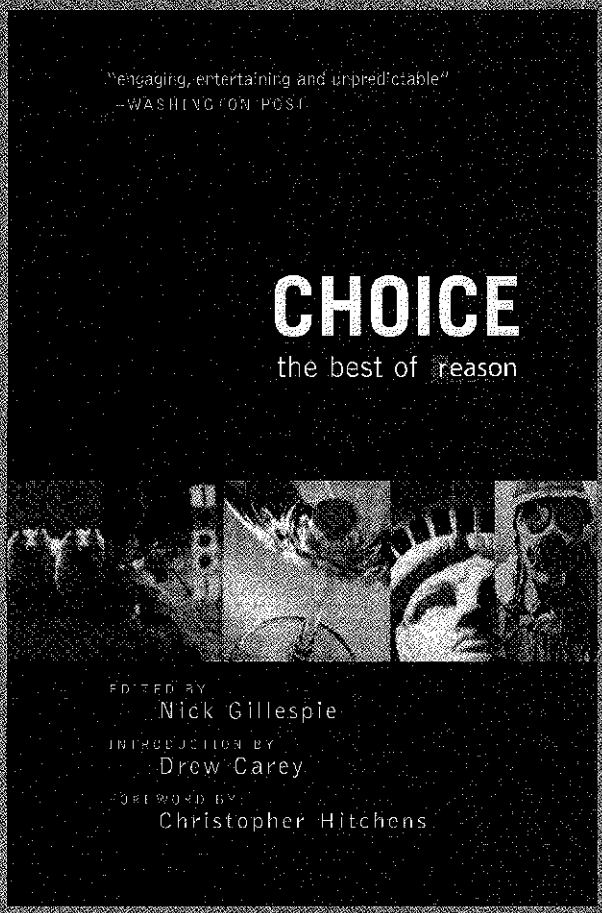

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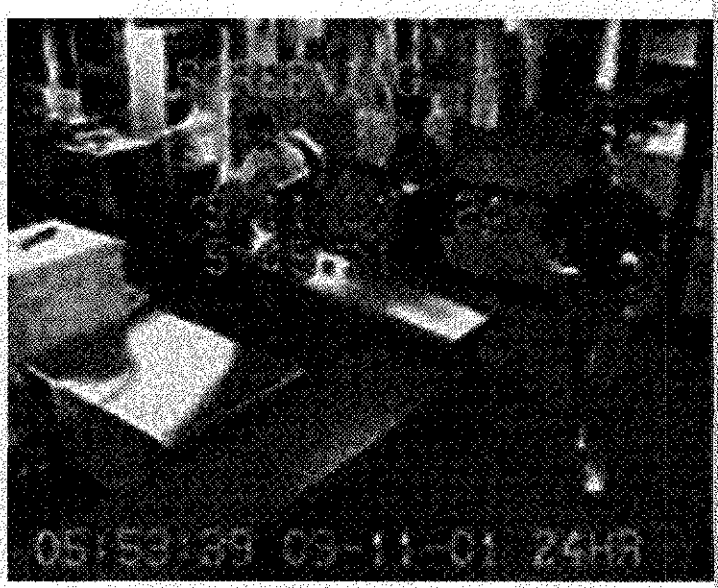

Hijackers Mohamed Atta and Abdulaziz Alomari are shown passing security at the Portland International Jetport in this surveillance photo released by the FBI.

Transportation Security Aggravation

Debating the balance between privacy and safety in a post-9/11 aviation industry

Robert W. Poole Jr. and Jim Harper

In the wake of the 9/11 terrorist attacks, air travel has gone through a disruption whose effects are still being felt: continuing fear and anxiety on the part of passengers and airlines alike, the creation of a massive new federal bureaucracy of doubtful efficiency and efficacy, and airport hassles that were once unimaginable and now seemingly intractable, to name just a few. More than three years after the worst terrorist attacks on American soil, the best way to balance passenger safety, privacy, and convenience is far from settled.

In December 2004, **reason** invited Robert W. Poole Jr. and Jim Harper to debate and discuss the best policy for secure air travel. Poole is director of transportation studies at the Reason Foundation and a former editor of this magazine. Harper is direc-

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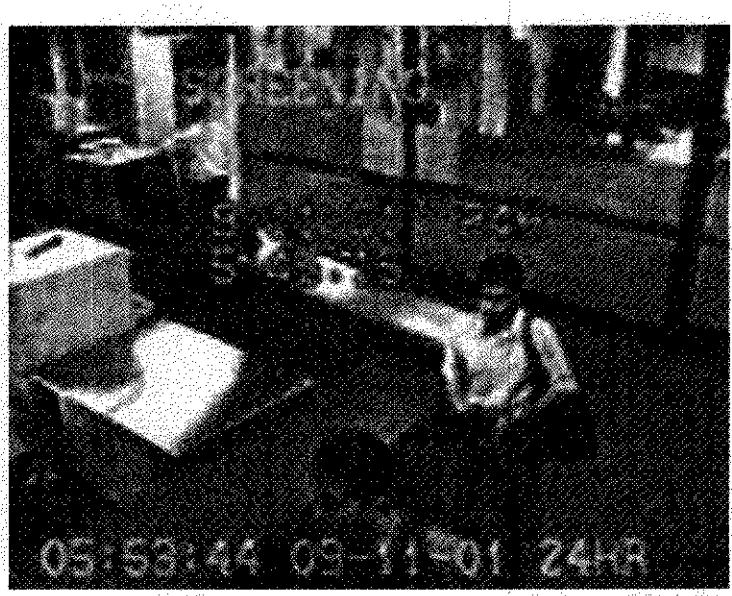

tor of information policy studies at the Cato Institute and editor of Privacilla.org, an online think tank dedicated to privacy issues. Comments can be sent to letters@reason.com.

Steps Toward Sensible Airline Security

Robert W. Poole Jr.

Against a comprehensive terrorist threat whose true dimensions are necessarily unknown, a free and open society has endless points of vulnerability. Attempting to "harden" all likely targets is a losing strategy—and a recipe for bankruptcy. But airplanes are very fragile, and if airliners were left unprotected and were thus subject to frequent destruction, a commercial airline industry would be unlikely to survive, with enormous negative consequences for mobility and our economy. Hence some degree of defense seems wise in the case of commercial aviation.

The single most effective thing that's been done in this regard is to retrofit much stronger cockpit doors, to deny terrorists access to pilots and controls should they manage to get on board. But the rest of aviation security policy is an inconsistent mix of overkill and underprotection. Mandating 100 percent inspection of checked bags for explosives, but not of carry-on bags, makes no sense. Neither does inspecting 100 percent of passengers for metal but not for explosives. Likewise, why inspect 100 percent of bags but not the cargo that flies alongside them?

Current security policy toward passengers and their bags operates as if every person and every bag were equally likely to pose a threat. The costs imposed—both wasted time from showing up an hour early and the hassles and indignities of screening—are very large. But the only alternative (short of doing nothing, which would make planes too attractive as targets) is to base airport security policy on known or expected risk, targeting inspection resources where they are most likely to make a difference.

One way to do this is to encourage a fraction of travelers to volunteer for pre-clearance. By getting the equivalent of a security clearance and an ID card that proves the person who shows up at the airport is the person who was cleared, such "registered travelers" and their bags could bypass most of today's intrusive screening. The other end of the risk continuum includes those about whom virtually nothing is known and those who, based on intelligence information, pose a possible risk. If those people can be identified, they

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can be subjected to screening somewhat more rigorous than what is today applied to all air travelers (e.g., the backscatter X-ray machines that see through clothing). With those policies in place for the low-risk and high-risk groups, those in the middle (most ordinary, nonfrequent fliers) could be screened in a manner similar to that in which we all were prior to 9/11.

We also need to fundamentally rethink the function of the Transportation Security Administration (TSA). Although the TSA is charged with protecting all forms of transportation, it devotes the vast majority of its staff and budget to airlines, presumably because Congress overreacted to 9/11. Yet cargo containers entering our ports and crossing our borders are also potential threat vectors, and railroads carrying hazardous chemicals are also vulnerable targets. So TSA ought to do a serious analysis of where America could get the most bang for our bucks in transportation security, and recommend changes to Congress accordingly. That would likely mean much less emphasis on airlines and somewhat more emphasis on other modes.

The other major problem with the TSA is its built-in conflict of interest. As created by Congress, TSA is both the security policy maker/regulator and a major provider of security screening services. That's as unwise as it was to put the now-defunct Atomic Energy Commission in charge of both promoting and regulating nuclear power. The TSA should be divested of its service provision role as part of refocusing its mission on security policy for our entire transportation system.

Airport security should become the responsibility of each airport owner, as it is in Europe, under TSA oversight. Today the TSA screens bags and passengers, but the airport controls access to the tarmac, secures the airport perimeter, and carries out other security functions, resulting in a needlessly fragmented system. Airport security would be more coherent if it were no longer divided in this way. A single security staff, reporting to the airport director, could be cross-trained in a number of functions. This approach would make it easier to beef up staff in screening lanes during peak periods, with the extra people going off to do other security jobs when traffic is lighter instead of standing around. And as in Europe, airports should be free to hire certified private security firms to perform these services.

In short, airline security needs to be rethought from the ground up, along with the rest of transportation security. The kinds of risk-based policies that are partially in place for cargo need to be applied to airline passengers as well. That change would concentrate limited security resources where they will do the most good, reducing the hassle factor for a large majority of air travelers.

Kill the TSA, Don't Reform It

Jim Harper

It is correct that airline security should be rethought from the ground up. But ground-up rethinking should really start at the ground. The TSA should be eliminated, not refocused.

Most arguments for federal government involvement in transportation security follow a logic that is not logic at all. Usually thoughtful policy experts utter things like: "I just think there is a federal role. I mean, look at what happened."

Robert Poole's justification for government provision of security to private industry is better: Airplanes are uniquely fragile, he says. But this logic proves too much. Yes, 9/11 demonstrated aviation's vulnerability. But a successful attack on a shopping mall, the food or water supply, chemical manufacturing, or any other target would make those institutions seem uniquely fragile too. All infrastructure and systems have important weaknesses. If the premise for federal authority were vulnerability, it would be boundless.

TSA security measures have been inconsistent and mindlessly reactive. This is because bureaucracies are poor at assessing and balancing risk. They are much better at surfing public opinion and following political cues. Witness the TSA's obsession with small, sharp things early in its tenure and the shoe fetish it adopted after Richard Reid demonstrated the potential hazards of footwear. This is not a foresighted, research-based, risk-assessing organization.

Highly effective, nonregulatory systems exist to analyze and respond to risk. They operate well, though not perfectly, when they are allowed to. They start with the tort system, which places responsibility for avoiding foreseeable harms with the parties in the best position to avoid them. Through insurance contracts, businesses in every sector of the economy spread risk and often purchase expert advice on loss avoidance.

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Robert W. Poole Jr.: By getting the equivalent of a security clearance and an ID card that proves the person who shows up at the airport is the person who was cleared, such "registered travelers" and their bags could bypass most of today's intrusive screening.

An obvious question: If these systems are so good, how did they fail us on 9/11? Unfortunately, no one had seriously contemplated that airplanes might be commandeered and used as missiles. Our private-sector risk avoidance systems are good but not perfect. No real-world system—public or private—foresaw the 9/11 terrorists' actions, so audacious in planning and so lucky in execution.

Things always seem more foreseeable in hindsight. And the airlines recognized after 9/11 that some court somewhere might heap bankrupting liability on them by finding that the attacks and their results were predictable. Moving swiftly to capitalize on emotion and patriotism, the airlines sought to shield themselves from liability, acquire an infusion of taxpayer dollars, and push their security obligations onto the government.

Hence the impossibly murky airline security system we have today. Lines of authority are unclear. Lines of passengers are long. Rules are unclear. Responsibility is unclear.

Airlines should be given clear responsibility for their own security and clear liability should they fail. Under these conditions, airlines would provide security, along with the best mix of privacy, savings, and convenience, in the best possible way. Because of federal involvement, air transportation is likely less safe today than it would be if responsibility were unequivocally with the airlines.

The costs of the status quo are tremendous. Taxpayers are funding another new and sure-to-grow bureaucracy. Air travel has rebounded, but certainly not to the levels it should have reached by now. Thousands of would-be travelers are staying away. Those who do travel are wasting millions of hours per year standing in lines. And they are shedding dignity by the bushel as they undergo compulsory frisking by TSA law enforcers.

The air travel industry is already beginning to figure out the bad bargain they struck when they pushed their security responsibilities onto the government. But they will not take into account another tremendous cost of abandoning their responsibility: erosion of civil liberties.

The same policy experts who see a federal role in airline security "just because" seem not to see that the TSA's airport security procedures are an unconstitutional search and seizure within the meaning of the Fourth Amendment. Intrusions on the individual right to be free of search and seizure are allowed, but they must be reasonable. The TSA stops everyone without regard to individualized suspicion. Either that policy is unreasonable, or every search is reasonable in the era of terrorism. Let's hope it's not the latter.

Allegedly to reduce the incidence and intrusiveness of such searches, the government is pressing forward with plans to do background checks on travelers, again without regard to suspicion. The reviled Computer Aided Passenger Pre-Screening System, better known as CAPPS II, has been renamed Secure Flight, but it still relies on searching databases of information about travelers. National ID legislation to streamline and strengthen this process passed at the end of the 108th Congress. These erosions of liberty result directly from the government's acquisition of the airlines' role in securing their operations.

When security is provided by the airlines, searches and background checks can be a condition of travel because constitutional restrictions do not apply to private actors. Airlines, eager to retain customers, will provide security in the least offensive and intrusive way consistent with the highest levels of safety. This may well include special lines with faster service for travelers who have undergone background checks. But only

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Jim Harper: TSA security measures have been inconsistent and mindlessly reactive. This is because bureaucracies are poor at assessing and balancing risk. They are much better at surfing public opinion and following political cues.

if security is private can we be assured that this choice will remain a genuine choice and not become mandatory.

There is no realistic business model in which airlines would skimp on security. Because of 9/11, the threats are now well recognized. The tort liability would be devastating if an airline failed to harden its defenses against threats, known or imagined, in light of the new knowledge. If an airline were inclined to go lax on security, hoping for the best rather than working to guarantee it, its insurers would quickly step in to correct it.

Businesses throughout our economy have taken a fresh look at their security procedures in light of the terrorist threat. Without fanfare or tremendous expense, likely targets of terrorist attack are being hardened. This is a winning strategy. Indeed, maintaining security as a private responsibility is the only acceptable strategy—unless we plan to destroy American life in order to save it.

Government's Essential Role in Travel Security

Robert W. Poole Jr.

Jim Harper and I agree on several points. But we appear to differ on a fundamental one: the need for government involvement in aviation security.

This need stems from the underlying fact that America (indeed, the whole West) is engaged in a war not of our choosing. Islamist terrorism is a deadly global threat, different in nature from that of Soviet communism but no less global and ongoing. And since Job No. 1 of government is national defense, it is very properly involved in defending Americans against this diffuse but deadly enemy.

In my opening comments, I noted the limitations of target hardening as a defensive strategy against terrorism. Operations researcher Manuel Trajtenberg of Tel Aviv University has applied game theory to the war between terrorists and society. Terrorists have to decide whether or not to strike and, if so, which targets to hit. Potential targets must decide how much to invest in their own security. And government decides what and where to invest in fighting terrorism. In his model, Trajtenberg compares two different government approaches: fighting terrorism at its source or hardening particular targets. Applying plausible numbers to his model, he finds that the former strategy is hundreds or thousands of times more effective than protecting individual targets.

So when I said that aviation security needs to be rethought from the ground up, it was with this kind of analysis in the background. In my view, the most important thing the federal government can do to counter terrorism is to find and kill the terrorists. That, in turn, depends on extensive intelligence work. And that provides the key to rethinking the role of whatever federal entity exists (call it the TSA or simply X) to address terrorist threats here at home.

The TSA or its replacement should be primarily an analytical agency, one that uses intelligence information to sort out and prioritize the terrorism risks facing America on its own territory. Only a federal entity with full access to comprehensive intelligence information can be in a position to carry out such analyses and make intelligent recommendations as to what kind of target hardening provides sufficient deterrence against such large potential losses as to be worth the investment.

Harper puts great stock in the role of insurance as a way

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of both incentivizing efficient levels of target hardening and of coping with the risks of loss from such events. I agree but must point out a huge caveat: If a risk is unquantifiable, it is uninsurable. In the wake of 9/11, aviation terrorism coverage was simply not available. Nobody in the insurance (or airline) business could quantify the risks, so nobody would offer a policy. Today, after three years of government efforts, however ham-handed, to strengthen aviation security, some very expensive coverage is starting to be available.

The TSA that Congress created is a far cry from what I'd like to see. To begin with, the failure of airport screening to prevent the 9/11 attacks stemmed directly from the Federal Aviation Administration's failure to define any sort of meaningful performance or training requirements for airport screeners. In a gross overreaction, Congress stampeded into nationalizing the screening industry while tripling screening's cost and making it far more intrusive. Yet after more than two years of full TSA operation, the agency has yet to demonstrate that the quality of screening is any better than it was pre-9/11. Thus far it has even failed at the most inherently governmental aspect of its aviation security task: providing real-time access to comprehensive intelligence information to identify people who pose a risk to aviation.

Harper and I agree that it is wrong for the TSA to "stop everyone without regard to individualized suspicion." Yet in his very next paragraph he undercuts his own position by opposing efforts to identify air travelers who may pose a threat. There are only two ways of dealing with the needle-in-a-haystack problem of finding would-be terrorists among millions of airline passengers: Either screen every passenger and piece of luggage rigorously, without regard to individualized suspicion, or use information to sort out passengers on the basis of risk. The latter approach is basic to every kind of police and security work, and it is the only policy that makes sense, from both an economic and civil liberties point of view.

But how would it work? As I mentioned in my first contribution, those who volunteer for pre-clearance constitute one low-risk group, needing little if any screening. Those showing up on serious, comprehensive watch lists constitute a high-risk group, needing rigorous screening. Individualized information is needed to sort people into both of these groups. What about somebody who shows up at the airport with no ID, or whose ID cannot be verified in any way? Common sense says he's a possible high-risk group member, certainly compared to someone with, say, a substantial credit history. This is a complex issue, but Harper's dismissal of efforts such as Secure Flight that would verify a traveler's identity is inconsistent with his position that travelers should receive more than cursory airport screening only when there are grounds for "individualized suspicion."

Much of what today's TSA does, including the airport screening that accounts for the bulk of its work force, should be done by private firms, working for the airport owner. And "registered traveler" programs can and should be run by airlines and their contract service firms as a benefit for their frequent fliers. But the core of aviation security involves making use of intelligence to identify terror threats, make aviation security policy, and provide the individualized information necessary for a risk-based security system to function. Those tasks are inherently governmental, a vital part of national defense in the war against terrorism.

Security Is Better Private

Jim Harper

In a Fall 2004 article for *Regulation* magazine, "A False Sense of Insecurity?," Ohio State political scientist John Mueller, a national security expert, pointed out that terrorism is minimally destructive compared to other dangers. Terrorism does most of its damage through hasty, ill-considered, and overwrought reactions.

In almost all years, the total number of people who die at the hands of international terrorists anywhere in the world is not much more than the number who drown in bathtubs in the United States. Since the State Department began counting, about the same number of Americans have been killed by terrorism as by lightning, accident-causing deer, or severe allergic reactions to peanuts.

Mueller's point: Terrorists can be defeated simply by not becoming terrified. We pay no homage to the victims of 9/11 and their families if we allow hyperbole and fear to overcome reason. The "deadly global threat" of Islamist terrorism cited by Robert Poole has so far proven far less deadly to Americans than, say, overeating.

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This is not to say that the terrorist threat is not serious. There are undoubtedly groups plotting out there who wish to build upon the spectacular luck of the 9/11 terrorists.

But the threat should be kept in perspective. The so-called war on terrorism calls for neither (further) suspending the limits on the federal government nor (further) blurring the line between private and public responsibility. Indeed, each of our major points of contention is resolved by keeping in mind the proper roles of government and the private sector.

On target hardening, Poole takes the thrust of Manuel Trajtenberg's study and concedes that the proper role of government is to find terrorists and stop them, leaving target hardening to the owners of targets. The study did not conclude that target hardening should not be done—only that the most effective way to prevent terrorism is by acting against terrorists. Strengthening targets is not a zero-sum game, of course: Raising the difficulty of one attack does not lower the difficulty of another.

Corporations cannot pursue, arrest, or kill terrorists. That is what governments do. Concomitantly, governments lack the institutional knowledge to effectively harden private infrastructure, and they lack the incentives to properly nest security programs with business operations, customer service, and profitability.

Corporations can and must recognize the threat of terrorist acts and harden their infrastructures, both in the interest of business continuity and to avoid liability. Governments can and should collect and selectively share intelligence that suggests plausible threats to private infrastructure. This is a role not for a TSA but for true intelligence agencies.

On ID-based security, Poole places a great deal of stock in efforts to identify air travelers who may pose a threat. Many others do too. Surprisingly little analysis has gone into whether and how identification would work as a security measure against terrorism. But there is certainly a role for identification as part of a security mix. The question is whether the TSA, or the airlines, should assess individuals' propensity for dangerous acts.

The constitutional rights we all enjoy uniquely disable governments in the United States from investigating people who engage in nonsuspicious behavior such as air travel. There's a good reason for that. Our success as a nation, both economically and spiritually, derives from our freedom.

No such impediments exist in the private sector. Airlines should be free to make background checks a condition of travel. They should offer quicker security screening to those who open their lives to inquiry and require closer scrutiny of those wishing to travel anonymously. Having taken this role from the private sector, the TSA has kept airlines from working out the measures that are consistent with maximal security, customer service, privacy, convenience, and low cost.

Insurers have an important role to play in that process by fleshing out and driving home the airlines' security obligations. It is probably true that the risk of terrorism was unquantifiable in the immediate aftermath of 9/11. Actuaries, like so many others, had to adapt quickly to some new realities.

But since then, the federal government has done nothing but undermine the natural risk-prevention and risk-spreading processes of which insurance is a part. Imagine trying to insure a property against the risk of theft when the owner of the property is not responsible for locking the house. Imagine further that the homeowner could not take independent steps to secure the house from theft but had to seek regulatory permission to do so.

The Terrorism Risk Insurance Act passed in late 2002 was an industry sop just like the airline bailout. Cato Institute scholars noted early that year that Marsh and McLennan, the world's largest insurance broker, had formed a new subsidiary just days after September 11, 2001, to "sell insurance to corporate customers at sharply higher rates." The chief executive officer of XL Re, a Bermuda insurer, had told an industry conference, "The opportunity out there is tremendous." And *The New York Times* reported on December 17, 2001, that the industry looked so attractive that new money was pouring in to start new companies and expand existing operations. "[I]t is hard to remember a time when prospects looked better" for the commercial insurance industry, concluded the *Times*.

If you assume, as Poole does, that the federal government should provide security to private industry, then the role for the federal government does seem quite prominent. But the relative strengths of private and public actors suggest a greater role for airlines and a smaller role for government in the provision of air security. When the costs to civil liberties are included, the case against

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Jim Harper: We pay no homage to the victims of 9/11 and their families if we allow hyperbole and fear to overcome reason. The "deadly global threat" of Islamist terrorism has so far proven far less deadly to Americans than, say, overeating.

government-provided security becomes overwhelming.

Most of the air security reforms Robert Poole recommends are intelligent and well taken. We are more likely to see them implemented when responsibility for air security is returned to its rightful place.

Screen Based on Risk

Robert W. Poole Jr.

Jim Harper and I seem to agree on quite a lot. In my latest *Aviation Security Update* newsletter, I commended John Mueller's *Regulation* article about exaggerated fear of terrorism. Far too much of the congressional and media response to 9/11 and Osama bin Laden has been based on hyperbole. But I do believe we are engaged in a war against deadly enemies, who must be fought not with costly feel-good measures but with intelligence work, interdiction, selective target hardening, and beefed-up disaster response capabilities.

I agree that target hardening ought to be the responsibility of each property owner, relying on advice and information from a federal agency that generates and uses comprehensive, up-to-date intelligence information. This is largely the case today when it comes to such targets as malls, office buildings, sports facilities, electric utilities, highways, ports, and railroads. Airports and airlines are unique in having been singled out for both significant new regulation and large federal funding. As I've been pointing out in my newsletter for the last several years, this stems not from any careful assessment that aviation is the most likely future terrorist target but from congressional overreaction in the weeks following 9/11.

Harper and I also agree on the role of insurance, both in helping to spread risks and in motivating protective measures. It's encouraging to see the insurance industry coming to grips with terrorism risk (see, for example, Gordon Woo's article, "Understanding Terrorism Risk," in the January 2004 issue of *The Risk Report*).

Where Harper and I are farthest apart is on the role of government in what he calls "ID-based security." In his response, Harper fails to address the choice between treating every passenger the same, as most privacy advocates have been demanding, or singling out only "suspicious" passengers for serious scrutiny. Since the public demands some degree of passenger screening, the "privacy" position entails putting every passenger through intrusive hassles at enormous cost. The alternative, which I favor, is to screen passengers based on their estimated risk levels, and that requires verifying their identities and checking up-to-date watch lists.

This is a job best suited to a federal agency with full and complete access to intelligence information. You don't want that kind of information appearing on the screens of thousands of reservations and check-in clerks (and perhaps leaking out who knows where). Nor should we publicize the factors used in deciding on the risk estimate for a given passenger, which would give Al Qaeda a guide to beating the system. The TSA's much-delayed Secure Flight system will do this job for the airlines, and it's appropriate that it do so. It's also appropriate that the TSA grant "clearances" to those accepted as members of airline-run registered traveler programs; after all, who else has the intelligence information to make such decisions?

Government has a limited role to play in aviation security. It's not the grandiose role spelled

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Robert W. Poole Jr.: The "privacy" position entails putting every passenger through intrusive hassles at enormous cost. The alternative is to screen passengers based on their estimated risk levels, and that requires verifying their identities.

out by the Aviation and Transportation Security Act of 2001, but it's a vital role in helping the private sector protect its customers and facilities against terrorist attacks.

Taking Security Into Private Hands

Jim Harper

When debating someone as reasonable and thoughtful as Robert Poole, the most difficult struggle is to maintain points of disagreement. The threat of new terror attacks, we agree, should not lead to excessive reactions, but to carefully thought out measures. Private owners of potential terrorist targets are best suited to harden their infrastructure against attack. The tort system and insurance markets are best for assigning responsibility, for weighing and reducing risk, and for apportioning any loss.

The remaining issue—ID-based security—is a difficult one. In ordinary dealings, identifying someone has powerful effects. People who know they are known are also aware that they can be held accountable. Their bad acts may bring them social ostracism, exclusion, or civil and criminal liability.

But terrorists are not accountable to worldly justice. Identification does not restrain them this way.

The other reason for identification is to match people against lists of known terrorists and suspects. This appears to be the basket in which Poole would place his security eggs. A federal agency with "full and complete access to intelligence information" could determine the risk presented by passengers, he says, selecting those appropriate for extra screening.

But there will never be a perfect watch list, making the recipe for defeating such an approach very simple: Live quietly and fly occasionally. Once assured of being in a low-risk category, the terrorist can act.

ID-based security is intuitive but deeply flawed. It may supplement, but it will never replace, the proper focus for securing private infrastructure: assessing and addressing the tools and methods terrorists may use.

ID-based or not, the homogeneity of government-provided security can assist those planning a terrorist attack. "Blame" can be spread far and wide, of course, but the uniformity of federally regulated airline security surely helped smooth the 9/11 killers' planning. They knew that, regardless of what airline they chose, they would pass through similar metal detectors and receive similar secondary screening. They knew they would not meet additional security elsewhere in the airport. They knew the cockpits on all the planes would have similar doors. They knew the pilots would not be armed.

A heterogeneous, fully private airline security system would have raised the difficulty level and could have frustrated planning for the 9/11 attacks. Airlines and travelers should be extremely leery of the security and protection offered by government agencies and officials. The veneer of security that comes with officialdom is thin.

On the last of the 9/11 planes, passengers learned that the terrorists were flying commandeered jets into buildings. The airline security system had failed these passengers and compliance with the terrorists would not save them. Taking security into their own hands, they charged the cockpit, saving the lives of others if not themselves. This is far from a satisfying example, but it illustrates the better result when security is provided by interested parties with a real stake in the outcome. ■

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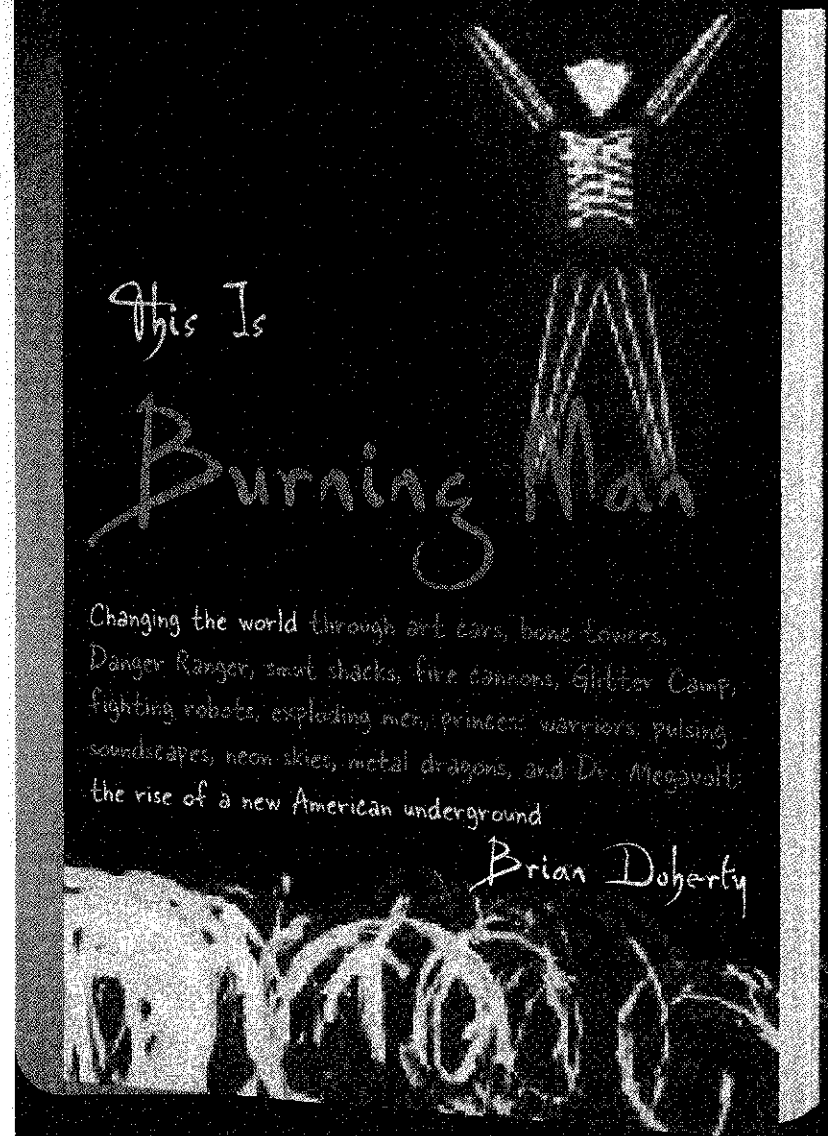
"An insider's look at a cornerstone of American subculture."

—*Publishers Weekly*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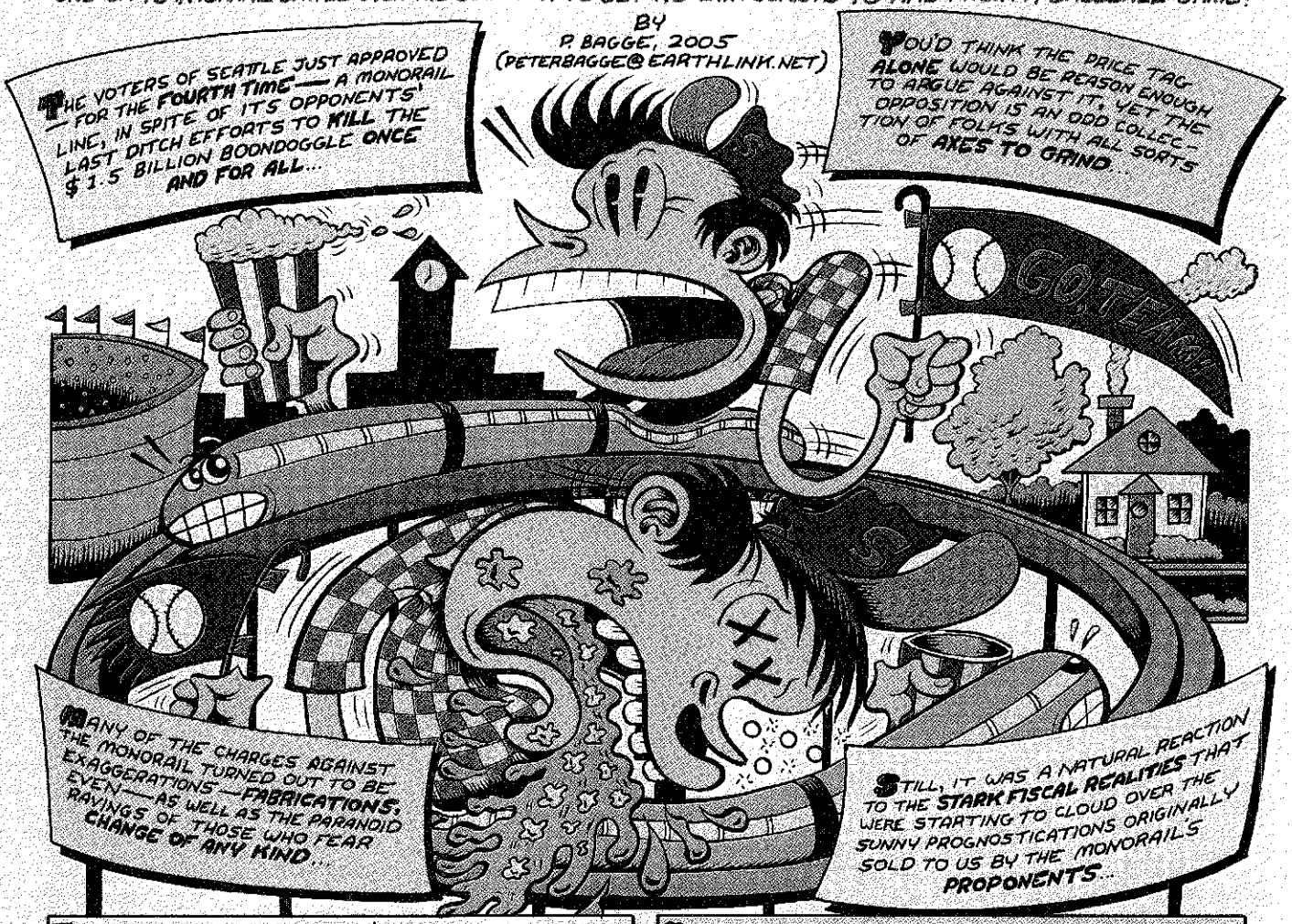
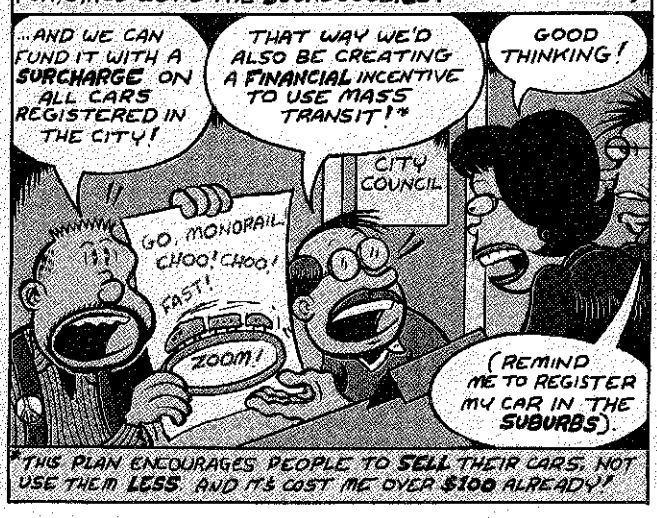
MY VERY OWN MONORAIL

ONE CITY'S INTERNAL BATTLE OVER THE BEST WAY TO GET ITS CARTOONISTS TO AND FROM A BASEBALL GAME!

BY
P. BAGGE, 2005
(PETERBAGGE@EARTHLINK.NET)

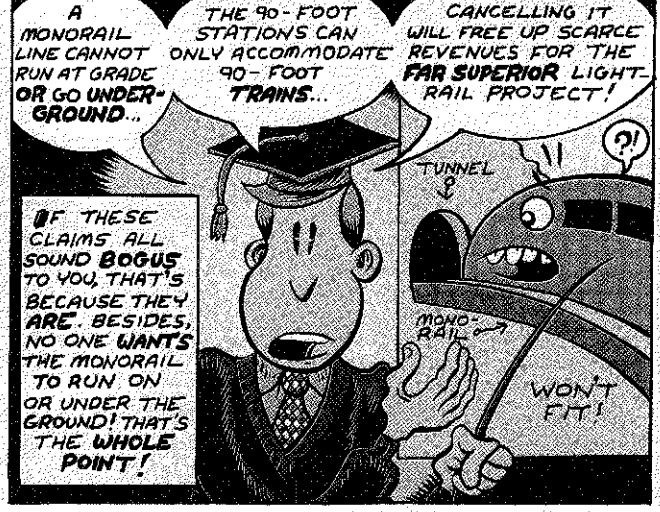

THE VOTERS OF SEATTLE JUST APPROVED — FOR THE FOURTH TIME — A MONORAIL LINE, IN SPITE OF ITS OPPONENTS' LAST DITCH EFFORTS TO KILL THE $1.5 BILLION BOONDOGGLE ONCE AND FOR ALL...
YOU'D THINK THE PRICE TAG ALONE WOULD BE REASON ENOUGH TO ARGUE AGAINST IT, YET THE OPPOSITION IS AN ODD COLLECTION OF FOLKS WITH ALL SORTS OF AXES TO GRIND...
GO!!
MANY OF THE CHARGES AGAINST THE MONORAIL TURNED OUT TO BE EXAGGERATIONS — FABRICATIONS, EVEN — AS WELL AS THE PARANOID RAVINGS OF THOSE WHO FEAR CHANGE OF ANY KIND...
STILL, IT WAS A NATURAL REACTION TO THE STARK FISCAL REALITIES THAT WERE STARTING TO CLOUD OVER THE SUNNY PROGNOSTICATIONS ORIGINALLY SOLD TO US BY THE MONORAIL'S PROPONENTS...

THE RELATIVELY "GRASSROOTS" MONORAIL PROJECT WAS ORIGINALLY CONCEIVED AS AN ALTERNATIVE TO A PROPOSED ÜBER-BOONDOGGLE LIGHT-RAIL LINE (WHICH WE ALSO VOTED FOR, SINCE WE'RE THE BOONDOGGLIEST TOWN AROUND!)


...AND WE CAN FUND IT WITH A SURCHARGE ON ALL CARS REGISTERED IN THE CITY!
THAT WAY WE'D ALSO BE CREATING A FINANCIAL INCENTIVE TO USE MASS TRANSIT!*
GOOD THINKING!
CITY COUNCIL
GO, MONORAIL! CHOO! CHOO! FAST!
ZOOM!
(REMIND ME TO REGISTER MY CAR IN THE SUBURBS).

*THIS PLAN ENCOURAGES PEOPLE TO SELL THEIR CARS, NOT USE THEM LESS. AND IT'S COST ME OVER $100 ALREADY!

MEANWHILE, THE MONORAIL'S OPPONENTS TROTTED OUT THEIR OWN TELEGENIC "EXPERT" ENGINEER, WHOSE FACE FILLED THE AIRWAVES MAKING ALL SORTS OF DIRE CLAIMS...


A MONORAIL LINE CANNOT RUN AT GRADE OR GO UNDERGROUND...
THE 90-FOOT STATIONS CAN ONLY ACCOMMODATE 90-FOOT TRAINS...
CANCELLING IT WILL FREE UP SCARCE REVENUES FOR THE FAR SUPERIOR LIGHT-RAIL PROJECT!
IF THESE CLAIMS ALL SOUND BOGUS TO YOU, THAT'S BECAUSE THEY ARE. BESIDES, NO ONE WANTS THE MONORAIL TO RUN ON OR UNDER THE GROUND! THAT'S THE WHOLE POINT!
TUNNEL
?!
MONO-RAIL
WON'T FIT!

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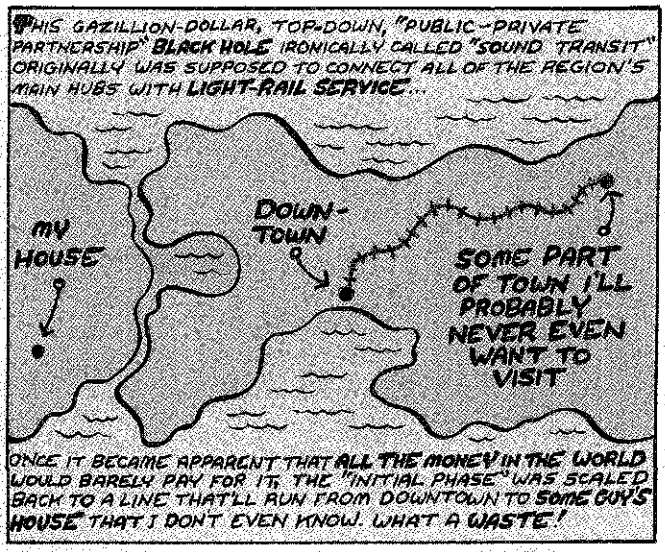
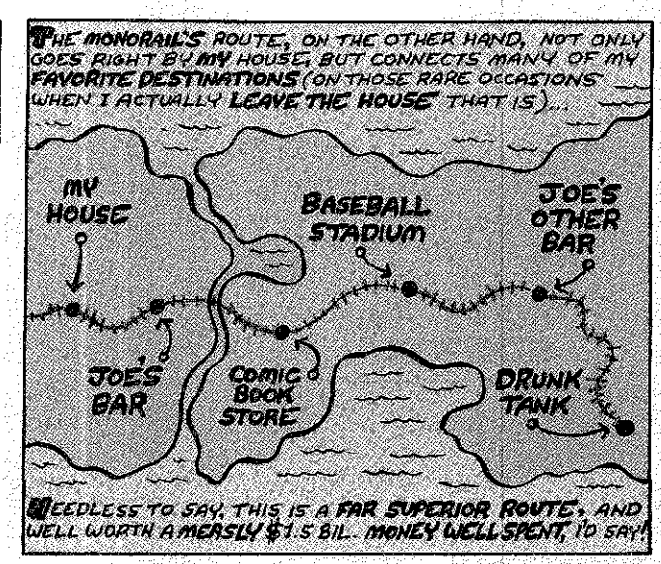
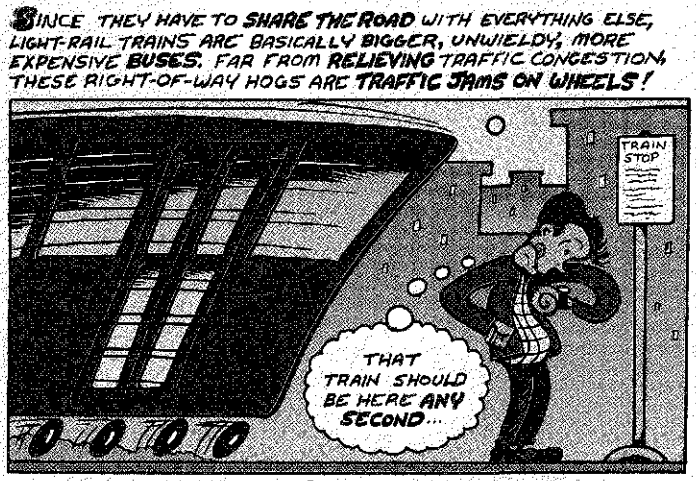
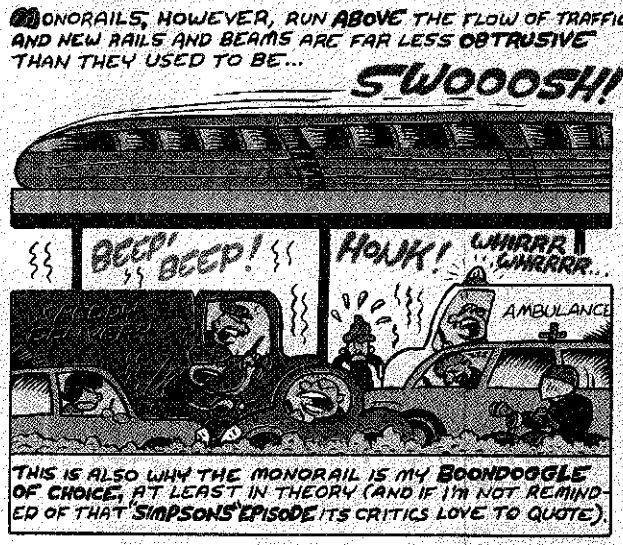
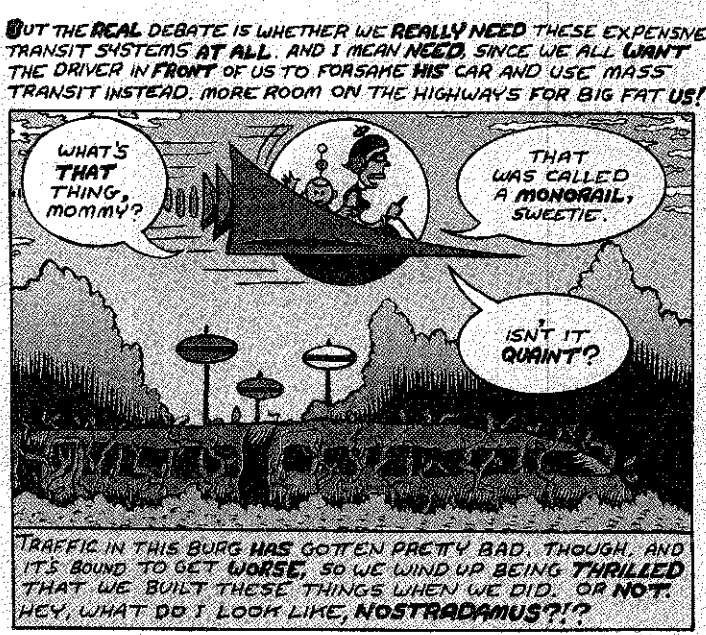

THIS GAZILLION-DOLLAR, TOP-DOWN, "PUBLIC-PRIVATE PARTNERSHIP" BLACK HOLE IRONICALLY CALLED "SOUND TRANSIT" ORIGINALLY WAS SUPPOSED TO CONNECT ALL OF THE REGION'S MAIN HUBS WITH LIGHT-RAIL SERVICE...
MY HOUSE
DOWN-TOWN
SOME PART OF TOWN I'LL PROBABLY NEVER EVEN WANT TO VISIT
ONCE IT BECAME APPARENT THAT ALL THE MONEY IN THE WORLD WOULD BARELY PAY FOR IT, THE "INITIAL PHASE" WAS SCALED BACK TO A LINE THAT'LL RUN FROM DOWNTOWN TO SOME GUY'S HOUSE THAT I DON'T EVEN KNOW. WHAT A WASTE!


THE MONORAIL'S ROUTE, ON THE OTHER HAND, NOT ONLY GOES RIGHT BY MY HOUSE, BUT CONNECTS MANY OF MY FAVORITE DESTINATIONS (ON THOSE RARE OCCASIONS WHEN I ACTUALLY LEAVE THE HOUSE THAT IS)...
MY HOUSE
BASEBALL STADIUM
JOE'S OTHER BAR
JOE'S BAR
COMIC BOOK STORE
DRUNK TANK
NEEDLESS TO SAY, THIS IS A FAR SUPERIOR ROUTE, AND WELL WORTH A MERELY $1.5 BIL. MONEY WELL SPENT, I'D SAY!


SINCE THEY HAVE TO SHARE THE ROAD WITH EVERYTHING ELSE, LIGHT-RAIL TRAINS ARE BASICALLY BIGGER, UNWIELDY, MORE EXPENSIVE BUSES. FAR FROM RELIEVING TRAFFIC CONGESTION, THESE RIGHT-OF-WAY HOGS ARE TRAFFIC JAMS ON WHEELS!
TRAIN STOP
THAT TRAIN SHOULD BE HERE ANY SECOND...
AND THANKS TO NEW NOISE REDUCTION TECHNOLOGY, I ALMOST GET RUN OVER BY ONE EVERY TIME I VISIT PORTLAND, OR.!


MONORAILS, HOWEVER, RUN ABOVE THE FLOW OF TRAFFIC, AND NEW RAILS AND BEAMS ARE FAR LESS OBTRUSIVE THAN THEY USED TO BE...
SWOOOSH!
BEEP! BEEP!
HONK!
WHIRRR GWRRRR...
AMBULANCE
THIS IS ALSO WHY THE MONORAIL IS MY BOONDOGGLE OF CHOICE. AT LEAST IN THEORY (AND IF I'M NOT REMINDED OF THAT SIMPSONS EPISODE ITS CRITICS LOVE TO QUOTE).

DEBATING THESE TWO SYSTEMS' PROS AND CONS CAN GET AS HEATED AS DISCUSSING RELIGION OR POLITICS, AND SOME OF THE FEARS EXPRESSED AGAINST THE MONORAIL BORDERS ON THE DERANGED...
IT'LL BLOCK OUT THE SUN! WE'LL BE PLUNGED INTO ETERNAL DARKNESS!
IT'LL BRING PEOPLE TO MY NEIGHBORHOOD WHO DON'T LIVE THERE!
BILLIONAIRE DEVELOPERS SHOVED IT DOWN OUR THROATS TO INCREASE PROPERTY VALUES!
IT'LL DESTROY PROPERTY VALUES!


BUT THE REAL DEBATE IS WHETHER WE REALLY NEED THESE EXPENSIVE TRANSIT SYSTEMS AT ALL. AND I MEAN NEED. SINCE WE ALL WANT THE DRIVER IN FRONT OF US TO FORSAKE HIS CAR AND USE MASS TRANSIT INSTEAD. MORE ROOM ON THE HIGHWAYS FOR BIG FAT US!
WHAT'S THAT THING, MOMMY?
THAT WAS CALLED A MONORAIL, SWEETIE.
ISN'T IT QUAINT?
TRAFFIC IN THIS BURG HAS GOTTEN PRETTY BAD, THOUGH, AND IT'S BOUND TO GET WORSE, SO WE WIND UP BEING THRILLED THAT WE BUILT THESE THINGS WHEN WE DID. OR NOT. HEY, WHAT DO I LOOK LIKE, NOSTRADAMUS?!?

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WHILE THESE MASS TRANSIT PROJECTS MAY BE AN ECONOMIC BOON TO THE NEIGHBORHOODS THEY SERVE, THEY ALSO MAY SPELL DISASTER FOR THE MANY SMALL BUSINESSES THEY'LL BE DISPLACING...
COMING SOON: THE FUTURE SITE OF THE NEW MONORAIL STATION!
Salon
COINS AND STAMPS
PIZZA
OF COURSE, WE'RE OBLIGED TO PAY FOR THEIR RELOCATION, BUT THEIR HARD-EARNED CLIENTELE ISN'T LIKELY TO MOVE WITH THEM.
IN FACT, A GOVERNMENT EXERCISING ITS EMINENT DOMAIN PRIVILEGES IS NEVER A PRETTY SIGHT WHEN YOU'RE ON THE FRONT LINES...
WE'VE DECIDED TO CONDEMN YOUR HOTEL, SINCE IT'S THE UGLIEST BUILDING AT THIS INTERSECTION...
BUT I JUST TOOK OUT A BANK LOAN TO RENOVATE IT!
OH, WELL. TOO LATE!
BLUEPRINT FOR THE CHINATOWN STATION
IN THE NAME OF "PROGRESS," A WELL-FINANCED GRAND VISION OFTEN WINDS UP CRUSHING MANY SMALLER, HUMBLER ASPIRATIONS.
YET THESE ISSUES ALSO ILLUSTRATE WHY A PRIVATELY BUILT AND RUN MASS TRANSIT SYSTEM ON THIS SCALE WOULD BE ALL BUT IMPOSSIBLE...
I'M CONDEMNING YOUR PROPERTY TO MAKE ROOM FOR MY MONORAIL...
THINK AGAIN, PAL!
WHAT?
HOTEL
BLUEPRINT FOR MY STATIONS
EXTENDING EMINENT DOMAIN RIGHTS TO A PRIVATE COMPANY SHOULD BE AN IMPOSIBILITY, EVEN THOUGH WE DO IT ALL THE TIME IN THE FORM OF SPORTS STADIUMS AND LUXURY CONDO COMPLEXES.
THERE'S AN UNDENIABLE ANTI-AUTOMOBILE MENTALITY BEHIND ALL THESE TRANSIT PROJECTS—ESPECIALLY IN A COMMUNITY AS "ECOTOPIAN" AS SEATTLE IS...
?!?
SAY NO TO GLOBAL WARMING
FUME!
BLECH!
THIS SENTIMENT IS OFTEN EXPRESSED WITH A RELIGIOUS FERVOR THAT INCLUDES THE BELIEF THAT WE'RE CAUSING ANOTHER GLACIER TO MELT EVERY TIME WE DRIVE TO THE GROCERY STORE.
THE WORST ARE THE BICYCLE ADVOCATES, WHO FORCED US TO INSTALL UNDERUSED DESIGNATED BIKE LANES ALL OVER THE PLACE, SOMETIMES AT GREAT COST TO CERTAIN BUSINESSES...
WE WANT THIS BIKE PATH TO CONTINUE ALONG THIS ROUTE...
BUT, THAT'LL SEND MY INSURANCE RATES THROUGH THE ROOF...
DON'T YOU CARE ABOUT THE EARTH?
SVEN'S CHUM GRINDING
EARL'S HULL SCRAPING
OTHER COMMUNITY ACTIVISTS ONCE BLOCKED THE DEVELOPMENT OF CONDOS ON THE FORMER SITE OF ONE OF THESE AESTHETICALLY UNPLEASING BUSINESSES, CLAIMING THEY WANTED TO PRESERVE THEIR NEIGHBORHOOD'S "INDUSTRIAL BASE"!
LOOK, I MYSELF DON'T LIKE BEING DEPENDENT ON A CAR TO GET AROUND...
WHICH IS WHY I CHOOSE TO LIVE IN A PEDESTRIAN-FRIENDLY NEIGHBORHOOD.
STILL, A CAR CAN TAKE YOU ANYWHERE AT ANY TIME, WHICH IS WHY I CHOOSE TO OWN ONE...
GRAND CANYON 1,500 MI
WHY, LOOK AT ME NOW!
I'M OFF TO SEE THE GRAND CANYON!
ON A WHIM! WHEEE!

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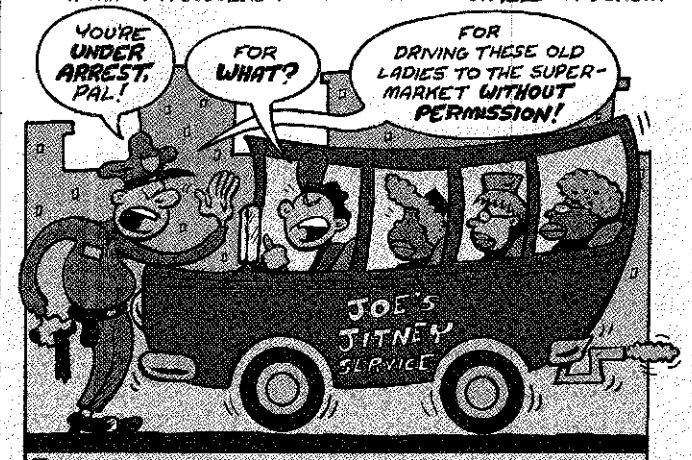
The most cost effective way to reduce traffic is to make driving itself more expensive, via increased gas taxes and/or tolls, thus compelling more people to carpool and/or shorten their commutes...

Kenny G's music always relaxes me when I drive...
I would be listening to Howard Stern by myself right now if I'd only gotten that raise!

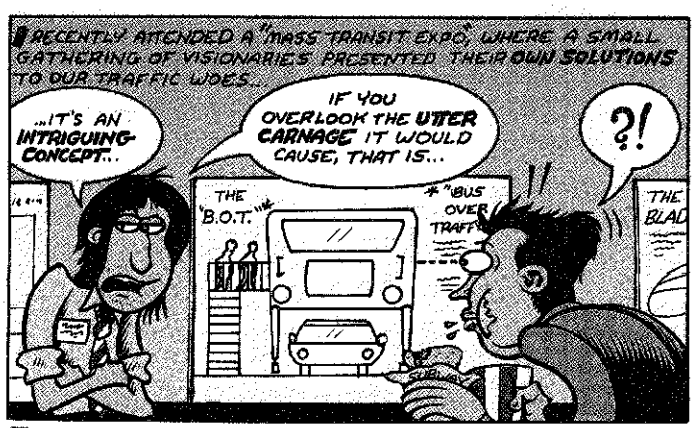
This form of social engineering is sure to work, too—on poorer commuters, that is, while making driving to work even more of a luxury.

In some cities, poorer neighborhoods are served by privately owned and operated mini-buses (a.k.a. "jitneys"), which can be a godsend for the more vulnerable citizens...


You're under arrest, pal!
For what?
For driving these old ladies to the supermarket without permission!
JOE'S JITNEY SERVICE

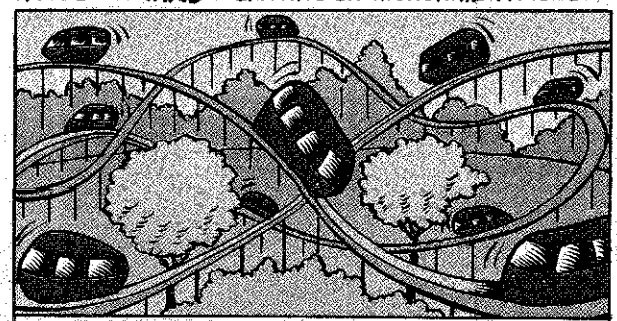
Unfortunately, city and transit union officials do their best to regulate them out of existence, since they're a threat to their people-moving monopoly.

I recently attended a "mass transit expo," where a small gathering of visionaries presented their own solutions to our traffic woes...



The wackiest of these was an elevated bus that would run at street level yet would drive over the flow of traffic. Even the other designers were taken aback by this concept!

The star concept at this event was the P.R.T., or "personal rapid transit" system, which is basically a fleet of taxis operating on monorail tracks.



Many airports have simplified versions of this, and some cities are actually considering building P.R.T. networks, even though they have to rely on computer models to trust that they'll work as advertised.

The faith that the P.R.T.'s proponents have in their "cure-all" transit solution is met with equal cynicism by others. One mass transit advocate friend of mine has particular disdain for their vision and tactics...

Those "pod people" did everything they could to derail my city's light-rail plans...
It's as if by buying more time they can convince us to build a P.R.T. line instead...
They're nuts!

While I myself am reluctant to completely write off any of these people-moving shemes, a land-use attorney I interviewed for this piece expressed utter contempt for all of them, thanks to his years of bitter experience...

One thing I have learned, though, is that the public always agrees on two things...
They're opposed to both density and sprawl!
Coming soon: The future site of downtown Seattle's space station!!
END!

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Who Killed Captain Video?

How the FCC strangled a TV pioneer

Glenn Garvin

The Forgotten Network: DuMont and the Birth of American Television, by David Weinstein, Philadelphia: Temple University Press, 228 pages, $24.50

YOU COULD HARDLY hear anything above the storm of outrage that day. The Federal Communications Commission (FCC) had just announced it was easing restrictions on television ownership, allowing a single owner to hold stations that reach 45 percent of American households instead of 35 percent, and Congress was snorting and drooling and barking like Old Yeller at the end of the movie.

"We really are going into uncharted territory," bawled Sen. Olympia Snowe (R-Maine). "What the FCC has done here is very destructive," added Sen. Byron Dorgan (D-N.D.). "I'm very disappointed in the FCC. They completely and totally caved in to big broadcasting interest, in my judgment, against the public interest."

The ruckus grew so great that even Sen. Trent Lott (R-Miss.) was roused from wherever he was sitting shiva for Strom Thurmond and the States' Rights Party. "This is not a Democrat or a Republican issue," Lott thundered. "This is not even really philosophical or regional. This is your view of the media and what type of regulations do we want in place to make sure that we have variety and diversity in the media and not a dominance by one company or just three companies."

Lott paused for breath, and in the background I could hear the faintest rustling noise. I am pretty sure it was Allen Du Mont, turning over in his grave. Or perhaps he was whispering a warning: *Anytime somebody wants the FCC to protect consumers from big business, reach for your remote.*

Du Mont, a TV manufacturer who began offering programming in an attempt to boost sales of his sets, created America's first television network in 1946, when he linked his pioneering stations in New York and Washington, D.C. It would grow to scores of affiliates and create some of the most memorable programming of television's infancy, including Jackie Gleason's *Honeymooners*, Ted Mack's *Original Amateur Hour*, and the lovably discombobulated *Captain Video and His Video Rangers*, which not only introduced a generation to the enthralling possibilities of outer space but arguably prepared its brains for the onslaught of hallucinogens that would come in the 1960s.

But by 1955 Du Mont's network was out of business, strangled in its crib by an FCC that was protecting not consumers but its old (and generous) clients, the radio networks, which wanted to get control of the burgeoning new medium before it seriously threatened them. Du Mont was the first victim of an FCC protectionist jihad that for three decades confined Americans to a three-channel television universe populated by video mutants like *My Mother the Car* and *My Living Doll*.

The Forgotten Network, David Weinstein's absorbing account of Du Mont's rise and fall, is aptly titled. Even the explanation of why the network altered the spelling of its creator's name to DuMont has been swallowed by the sands of time. Most television histories mention DuMont only as a footnote, if that, and because the network left the air before the invention of videotape, its programs have mostly faded from memory. When *The Hollywood Reporter* recently compiled a list of every scripted network program that ran for more than 100 episodes, it omitted DuMont's *Captain Video*, which had more than 1,500, as well as *Life Is Worth Living*, the prime-time religious lecture that ran five years and outlived the network itself.

It is the programming that most fascinates Weinstein, an administrator at the National Endowment for the Humanities, and three-quarters of *The Forgotten Network* is devoted to cataloging its peculiar mix of horny daytime hosts, late-blooming vaudevillians, and dime-store space warriors. Though NBC, CBS, and ABC also had eclectic lineups in the early days as everybody groped around in the dark, inventing TV on a daily basis, the DuMont Television Network was especially quirky.

Allen Du Mont himself was an engineer who cared little about programming content; when he watched TV, he spent most of the time flipping from channel to channel, tinkering with the controls to see which broadcast had the sharpest image. (*The New Yorker* once cracked that "Du Mont is always stimulated by Milton Berle's horizontal resolution, if not his jokes.") Moreover, DuMont ignored the standard network business model of the day, in which a single sponsor bought an entire show, then exercised totalitarian control over its content. Instead, DuMont programs usually contained commercials from several different advertisers, which meant every comma of a script didn't have to be approved by

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Procter & Gamble or General Mills. The result was that DuMont producers had much freer rein than their counterparts at the other networks, and—for better or for worse—they used it.

That freedom was never more obvious than at 7 p.m. Monday through Friday, when Captain Video whipped out his nucleamatic pistols and thermal ejectors to do battle with evil across the galaxy. Arriving on the DuMont airwaves in 1949 and sticking it out until the network shut down six years later, *Captain Video* was the first, the last, and certainly the mightiest (he had to be; the prop budget was just $25 a week) of the rocket-jock heroes who magnetically, mesmerically drew America's kids to those early TV sets.

Forget that *E.T./Close Encounters* we-come-in-peace stuff; Captain Video's policy was to use the atomic rifle first and ask questions later. Spouting outlandish technogibberish—"Throw out the interlocks! Hand me the opticon scillometer!"—and brandishing equipment made from surplus auto parts, he warred ceaselessly on sinister life forms from every corner of the universe, including a few (like the Black Planet, where tyrannized workers slaved away on collective farms) that sounded suspiciously close to home.

Cheapjack sets (it was not uncommon for the camera to catch sight of the pots of hot water and dry ice that produced the mysterious mists that cloaked so many of *Captain Video*'s alien worlds) were one of the show's signatures. Hopelessly inane scripts were another. *Captain Video*'s original writer, Maurice Brockhauser, was a hack of such prodigious proportions that a frothing producer banned him from the set: "I don't want to see him, I don't want to talk to him!" Eventually such budding science fiction authors as Arthur C. Clarke and Damon Knight helped churn out scripts. Even so, filling a daily half-hour slot proved so difficult that the producers began inserting a bit where Captain Video would check his televiewer to monitor the activities of his rangers around the world—an excuse to toss in 10 or 15 minutes of shootouts, fistfights, and cattle stampedes clipped at random from old Westerns in the DuMont library. (Are you beginning to understand *2001: A Space Odyssey*?) Adults found this stuff terrifyingly incomprehensible, but kids adored it; toy companies took in $50 million a year from sales of Official Captain Video decoder rings, crash helmets, and atomic weapons long before Walt Disney went into the coonskin cap business.

Captain Video may not even have been DuMont's weirdest character; that distinction probably belongs to Dennis James, the host of the daytime women's show *Okay, Mother*, a pre-Hefner ladies' man who was fond of double entendres and spent much of his airtime hitting on his pretty 18-year-old female sidekick. That show was so successful that DuMont lost it in a bidding war with ABC. Apparently we've been somewhat misled about the relative kinkiness of Eisenhower America.

But there was more to DuMont than eccentricity. The network developed several comedians, including Gleason, Morey Amsterdam, and Ernie Kovacs, who would later go on to stardom at other networks doing essentially the same material. It anticipated *Sesame Street* by two decades with a smarter-than-it-sounds program called *Your Television Babysitter*, and its *Your Television Shopper* was around way before cubic zirconium was cool.

Most intriguing of all was *Life Is Worth Living*, a weekly chat by the Catholic bishop Fulton J. Sheen on ethics and philosophy that for many Americans was probably an introduction, however cursory, to the thought of people like Aristotle and Thomas Aquinas. Sheen's plain-talk approach, soft peddling Catholic doc-

John Locke ©CORBIS

John Locke, Original Hipster

The Enlightenment roots of counterculture

Nick Gillespie

In a country where one of the most popular genres of music is called "alternative," the great refusenik Henry David Thoreau is a national icon, and acknowledged pot smokers have served as president (Bill Clinton) and speaker of the House (Newt Gingrich), would the last unabashedly mainstream American please turn off *The Lawrence Welk Show*? When the subversive has gone mainstream, does it make sense to talk about a "counterculture" anymore?

That's one of the questions raised by Ken Goffman and Dan Joy's enjoyably antic if slightly cracked *Counterculture Through the Ages: From Abraham to Acid House* (Villard). The book's short and provocative answer is this: In a post-9/11 world, one in which religious and neo-Luddite fundamentalists at home and abroad seek to stymie individualism and technological advances, it's more important than ever to understand and appreciate what might be called the »

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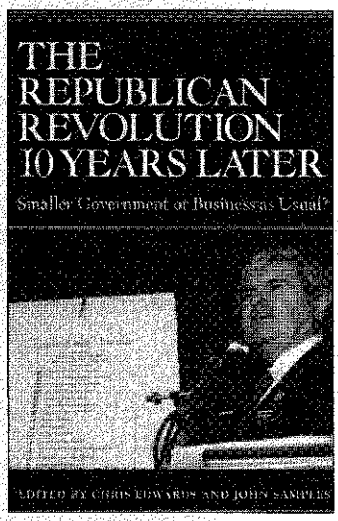
The Era of Big Government Is Not Over



The GOP came into office in 1994, promising revolutionary changes to government. Why did the 1994 landslide occur? Did Americans get the major policy changes promised? Have GOP reforms run out of steam after 10 years? In this essay collection, 18 experts—including the two key figures of the Republican revolution, Newt Gingrich and Dick Armey, and several Cato Institute scholars—provide insightful and thought-provoking answers to these questions and more.

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trine while twitting himself with gentle self-deprecatory humor, turned *Life Is Worth Living* into a genuine hit: It ran Frank Sinatra's CBS show in the same time slot off the air and made enough inroads against Milton Berle on NBC that the comedian was moved to remark that if you were going to tank in the ratings, it might as well be against a show written by the guy who scripted the Bible. *Life Is Worth Living* is virtually the only DuMont show to have survived the network's plunge into obscurity; reruns still air on the Eternal Word Television Network, the Catholic Church's cable channel.

Bishop Sheen stayed with DuMont until the day it went dark before moving his show over to ABC. More typically DuMont built a star's reputation, then watched him bolt to another network with deeper pockets. For most of its life, DuMont tottered on a financial abyss, too poor to promote its programs or to fund them properly. (The stark, seedy look of Jackie Gleason's *Honeymooners* apartment had as much to do with the poverty of DuMont's props department as with any creative impulse.)

Radio networks wanted to extend their hegemony to the new medium of TV, and the FCC was their Praetorian Guard.

Part of the problem was Allen Du Mont himself, a visionary engineer but an uncertain businessman and a political naif. A polio victim whose bed-bound childhood was spent putting together crystal radio kits, he went to work after college manufacturing radio tubes first for Westinghouse, then for DeForest. When the latter went bust, he set out on his own in 1929, building cathode-ray tubes in his garage. Initially the fragile tubes were used mostly in medical and military equipment, but as Du Mont improved their shelf life, television became a practical possibility. In 1938 he started manufacturing sets. Two years later he set up New York City's second TV station, hoping to stimulate sales.

Du Mont had little experience with the retail public and none with show business, and it showed. He staffed his boardroom with military men—one former admiral regaled everyone who would listen with tales of the epic battles he staged nightly in his bathtub with model ships—and his network with their cronies and kids. He funded his move into television by selling part of his company to Paramount in a disastrously structured deal that gave the penurious studio virtual veto power over his spending.

But Du Mont's real problem was the FCC, long a lackey of the big radio networks, NBC and CBS. (ABC—only recently spun off from NBC, where it had been one of the company's two radio nets—was somewhat less powerful.) Those years were what one FCC commissioner would later recall as "the whorehouse era," when mythic network lobbyists like Scoop Russell and Earl Gammons magisterially strolled Washington hallways, dispensing cash and instructions to their federal minions. The networks were determined to extend their broadcast hegemony into the new medium of television, and they used the FCC as their Praetorian Guard.

The FCC's target of choice was affiliations. The commission, arguing that television needed to be local, had already capped the number of stations that could be owned outright

The Forgotten Network (cover detail)

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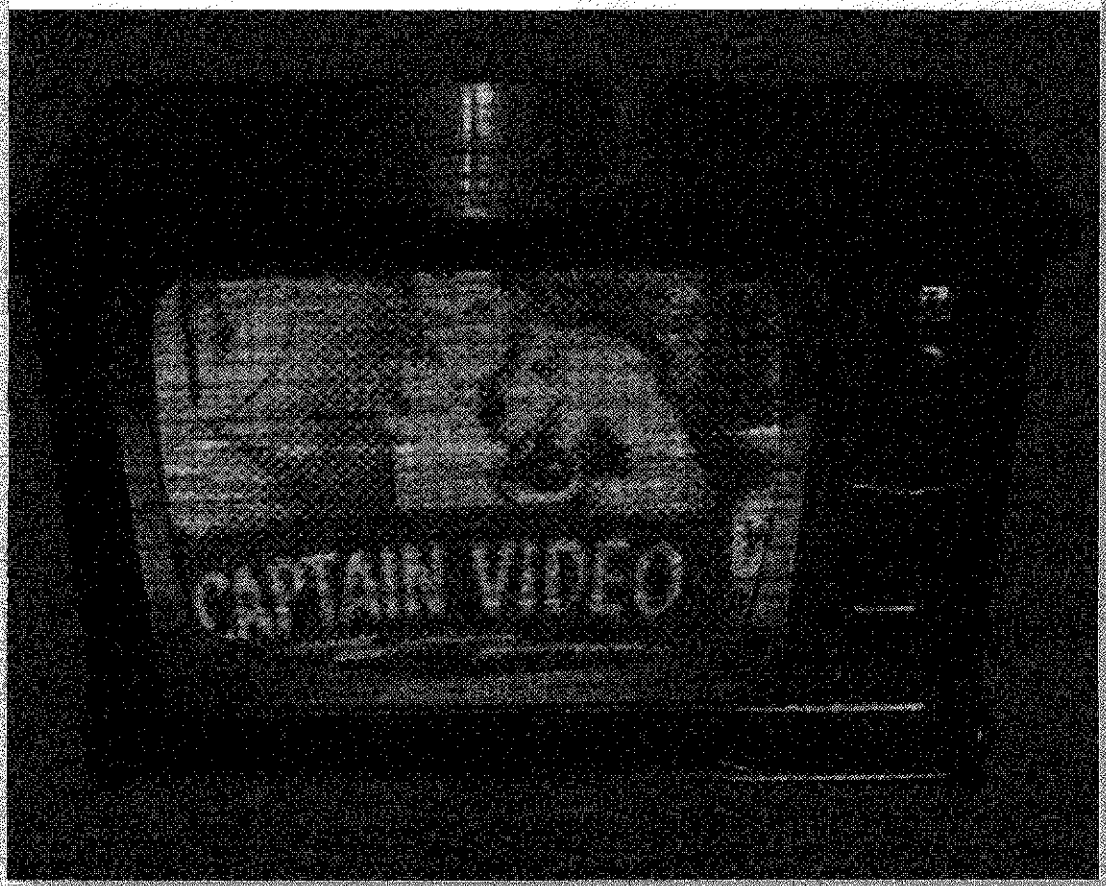
by any one network at five. Because its partner Paramount owned an independent station in Los Angeles, DuMont could have only four, a 20 percent competitive disadvantage. (Curiously, the FCC's concern for a healthy television industry did not extend to the blatant ways the networks retarded the development of TV. For years there was no television during daylight because CBS, NBC, and ABC didn't want to cut into their daytime radio audiences; only when DuMont began making money with its daytime lineup did the other nets reluctantly join in.)

DuMont was free to seek affiliation agreements with other stations. But its disadvantages were even greater when it came to affiliation. About 80 percent of television station owners also owned radio stations, and they were not willing to risk losing profitable network radio shows by linking their TV channels to DuMont, which had no radio programming to offer.

The killing thrust was yet to come, though. In 1945, with only a handful of TV stations on the air, the FCC—whether through cupidity or stupidity is unclear—had ruled that only 13 channels in the very-high-frequency (VHF) portion of the broadcast spectrum would be set aside for television. (That was later reduced to 12.) The commission's blunder was soon apparent. As more stations began setting up shop, their signals banged into one another. First stations in the same city were for the most part prohibited from broadcasting on adjacent channels (for example, 8 and 9), which cut the available channels in half. That didn't solve the problem; stations as far as 150 miles from one another suffered interference if they broadcast on the same channel. That effectively limited most metropolitan areas to three channels—meaning one network would lose out. Almost inevitably, that would be DuMont.

DuMont offered a plan that would have at the very least doubled the number of TV channels available in each city: The network proposed using VHF channels in some cities and



countercultural imperative, whose chief characteristics are personal freedom and constant change.

Better known by his techno-hipster *nom de revolution*, R.U. Sirius, Goffman is in a particularly strong position to plumb the issue. As a co-founder of *Mondo 2000*, a magazine that, along with *Wired*, helped to define and mythologize digital culture in the 1990s, and as a collaborator with LSD guru Timothy Leary, Goffman is steeped in the history and practice of the individuals and groups that have long delighted in turning on, tuning in, dropping out, skewering the bourgeoisie, and otherwise monkeying around with convention. (Joy originated the book project and contributed at various stages, but the volume is primarily Goffman's, which is how I will refer to it.)

As the title suggests, Goffman wants to give us a long view of "transgressive, avant-garde movements" that "challenge authoritarianism in both its obvious and its subtle forms" and embrace continuous individual and social change.

The result is a madcap trip across time and myth, a sort of Ken and Dan's excellent adventure that stresses the Promethean impulse to steal fire and give it to the common man. When it comes to the countercultural, Goffman notes in a representative passage, "We think of Goethe's immortality-seeking bad boy Faust. We think of Robin Hood and his merry band of Weathermen. We »

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the new UHF (ultra-high-frequency) channels (14 and higher) in others. Instead, the FCC decided to mix the two frequencies in each city, leaving established stations where they were and assigning newcomers to UHF. But that required viewers to buy an expensive new tuner and antenna to watch the UHF stations, and as DuMont predicted, most of them didn't. Why bother, when they could go on watching VHF for free?

The result was that just seven cities in America had four or more TV stations, and DuMont was frozen out. By 1952 its affiliates could reach only about 40 percent of American television sets. The network's final three years of operation were a tortuous end game, with DuMont selling parts of itself to stay afloat until there was nothing left.

Weinstein pulls no punches in describing the FCC's connivance with the dominant networks or the lethal effect it had on DuMont. But he also quotes without objection network executives such as ABC's Len Goldenson saying there was barely enough advertising to support three networks. That's the fox denouncing henhouse overpopulation. At the time the FCC was sticking a regulatory shiv in DuMont's back, television was taking off like one of Captain Video's runaway rockets. In 1947 the annual production of TV sets was 160,000; by 1950 it was 7.3 million. Advertisers could no more have ignored that than the *Titanic* could have ignored the iceberg.

Weinstein's book closes with the demise of DuMont. He would have had to continue for another three decades to give it a happy ending. The FCC continued to scamper alongside the feet of its network masters for another 30 years, a vigilant watchdog against competition. It battled cable television ("pay TV," the commission derisively labeled it) for years. In pre-satellite days, cable systems related their signals via microwave; the FCC denied licenses to microwave companies that did business with cable. Even when the outright ban was lifted, cable was blocked from the 100 biggest TV markets and forbidden to offer original programming. The FCC was forthright in saying it didn't want cable "siphoning off" viewers from the broadcast networks.

It wasn't until the mid-1970s that a series of court decisions began freeing up cable to compete. The result was not just cable-only channels such as CNN and HBO but a rebirth of broadcasting. On cable, UHF channels were no longer weak and fuzzy, and it was mostly on UHF stations that Fox, the first new American network in 40 years, made its 1986 debut. (Ironically, Fox's VHF affiliates included several stations founded by Allen Du Mont.) Since then, three more networks—the WB, UPN, and Pax—have been born, and in each case the umbilical cord leads straight to cable. Of the WB's 200-plus affiliates, more than half are essentially cable-only channels that cannot be picked up with an antenna.

Meanwhile, the lowest-common-denominator ethos of the three-channel world has been shattered; to compete with Tony Soprano and Carrie Bradshaw, the broadcast nets have been forced to come up with better, bolder programming of their own. And if you don't like it, then watch a ballgame (there are more than 30 sports channels these days), the news (around the clock, not just when Walter, Chet, and David feel like it) or even the Weather Channel. The days when Tuesday night meant choosing between *Petticoat Junction*, *Peyton Place*, and an old movie are gone forever. Forget what you hear from TV critics—*this* is the Golden Age of Television.

And the Trent Lotts and Olympia Snowes of the world want to unleash the FCC on it? As Captain Video used to say, "Let's blast them to space dust!" ▮

Contributing Editor Glenn Garvin is author of Everybody Had His Own Gringo: The CIA and the Contras (Brassey's) and, with Ana Rodriguez, Diary of a Survivor: Nineteen Years in a Cuban Women's Prison (St. Martin's). He writes about television for The Miami Herald.

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The Fever Swamps of Kansas

A leftist tries to make sense of grassroots conservatism.

Jesse Walker

What's the Matter with Kansas?: How Conservatives Won the Heart of America, by Thomas Frank, New York: Metropolitan Books, 306 pages, $24

A SPECTER ONCE haunted the Great Plains of America: the specter of populism. The agrarian radicals of the People's Party carried Kansas in the election of 1892—the national victor, Grover Cleveland, didn't even place—and throughout that decade the Kansas Populists elected governors, legislators, and judges; the laws they passed ranged from a ban on Pinkerton strikebreakers to a pay cut for county officials.

The state establishment regarded the newcomers with all the horror of a dowager discovering her daughter in bed with a hobo. In 1896, in an essay called "What's the Matter With Kansas?," the Emporia pundit William Allen White attacked the upstarts with withering sarcasm. "We have an old mossback Jacksonian who snorts and howls because there is a bathtub in the state house; we are running that old jay for Governor," he wrote. "We have another shabby, wild-eyed, rattle-brained fanatic who has said openly in a dozen speeches that 'the rights of the user are paramount to the rights of the owner'; we are running him for Chief Justice, so that capital will come tumbling over itself to get into the state. We have raked the old ash heap of failure in the state and found an old human hoop-skirt who has failed as a businessman, who has failed as an editor, who has failed as a preacher, and we are going to run him for Congressman-at-Large."

A century later, Kansas remains a hotbed of disreputable causes: It is headquarters for creationists, survivalists, militant anti-abortionists. But while the old populists, to the extent that they fit on the conventional spectrum, were a tribe of the radical left, their contemporary analogs are firmly rooted in the right. Like their 19th-century predecessors, they are a formidable force in state politics.

This puzzles Thomas Frank, a leftist pundit who has gradually moved from the world of self-published magazines to the op-ed page of *The New York Times*. His most recent book is *What's the Matter with Kansas?*, a jeremiad whose title is a deliberate, ironic echo of White's ancient rant. Across Middle America, but especially in the Sunflower State, Frank sees a "Great Backlash," a social-political trend that he doesn't define very precisely. Indeed, he never adequately answers the obvious question, "A backlash against *what*?" Frank says it began as a reaction to the ferment of the late '60s, but he also cites John Stormer's *None Dare Call It Treason* as "an early backlash text," even though it was published in 1964 and is much closer in spirit to the McCarthy movement of the '50s. (Of course, the McCarthyists themselves were a backlash of sorts.)

But it's not hard to see what Frank is getting at. Whatever precursors you might find in the McCarthy era and elsewhere, his Great Backlash begins with George Wallace's crusade against the "pointy-headed intellectuals" and Spiro Agnew's war on the "effete corps of impudent snobs." It encompasses the labor Democrats who supported Reagan in the '80s, and it now includes any Republican whose rhetoric evokes resentment of the coastal elites. Populist in its style but capitalist in its platform, it is, Frank argues, a genuinely grassroots phenomenon: "a working-class movement that has done incalculable, historic harm to working-class people." The point of the book is to understand why such a movement exists, focusing on Kansas as a bellwether but with an eye on all of Middle America.

» John Locke, Original Hipster

think of Alfred E. Neuman."

The book's cast of characters includes the familiar, with chapters on the likes of Socrates, the transcendentalists, the bohos of Paris' Cabaret Voltaire, the Beats, and Students for a Democratic Society. To his credit—and in keeping with the trickster quality he says defines counterculture—Goffman consistently complicates received narratives that hinge on glib distinctions between East and West, ancient and modern, hip and square.

Discussing postwar drug culture, for instance, he asks, "what should peace idealists make of Al Hubbard, a former OSS agent with powerful right-wing establishment connections" who became known as the "Johnny Appleseed of LSD"? Goffman's sections on Jewish, Taoist, Zen, and Sufi traditions bring welcome global and historical perspectives to the topic. Sufism, he notes, offers up a compelling counterpoint within Islam to the practices of the Taliban and the Iranian republic, one that seeks intoxication and ecstasy as a means of bypassing such mind-numbingly repressive regimes.

Despite Goffman's apparent sympathies for left-leaning, anti-technological movements ranging from Mexican Zapatistas to Northern Californian eco-terrorists, at the core of *Counterculture Through the Ages* is an unabashed defense of Enlightenment ideas about individualism, science, and material progress. Enumerat- »

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(Indeed, the first few pages discuss a county in Nebraska.)

Frank's prose is sharp and funny, and he writes with a Kansas native's appreciation for history and local detail. He avoids the condescension that often accompanies left-liberal ruminations on "angry white men"; he has an obvious affection for the state he's chastising and even for the conservative activists he profiles. He's at his best when he cuts through the cant of other commentators: mocking media clichés, making mincemeat of silly stereotypes about Red and Blue America, exposing the unexamined assumptions of such conservative pundits as Blake Hurst, Ann Coulter, and David Brooks. Brooks, the author of *Bobos in Paradise*, comes in for the most punches, almost all of which connect: Frank faults him for false or misleading statements about everything from high school cafeterias to the voting patterns of Chicago's North Shore.

By the end of the book, though, Frank feels like a bizarro-world version of his favorite antagonist. Frank and Brooks might not agree on much, but they're cut from the same cloth: Both are clever writers blessed with genuine insights but cursed with enormous blind spots.

Frank's argument, in a nutshell, is that you can't understand the backlash without thinking about class. In Kansas' war between conservative and moderate Republicans, here called Cons and Mods, the Cons tend to be less wealthy, less educated, less powerful; the Mods represent the upper-crust suburbanites who find the religious right embarrassing. In earlier days, Frank suggests, the backlashers' social status would have made them Democrats, but the Democratic Party has abandoned the appeals to class interests "that once distinguished them sharply from Republicans," and in this way they have "left themselves vulnerable to cultural wedge issues like guns or abortion and the rest whose hallucinatory appeal would ordinarily be far overshadowed by material concerns." (He does not claim that a majority of working-class voters embrace the backlash, just that a majority of the backlash is working-class.)

The Republicans, Frank continues, cannily focus their rhetoric on symbolic battles—against abortion, gay rights, teaching evolution—that they aren't likely to win. By his telling, the result is a perpetual state of grassroots anger that keeps propelling conservatives into office, where they abandon the liberal programs Frank likes and vote for "free market" policies that benefit the rich. As a result, the right has "rolled back the landmark economic reforms of the sixties (the war on poverty) and those of the thirties (labor law, agricultural price supports, banking regulation)." Now it wants to eliminate antitrust and other reforms "of the earliest years of progressivism."

Frank's argument gradually moves from the obviously accurate (the class composition of the conservative

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revolt, which he documents carefully) to the obviously fanciful (the alleged march toward laissez faire). Far from repealing the 20th century, the ruling party hasn't even made it past the '60s, given that our Republican president has pushed through an enormous, expensive expansion of Medicare, the Great Society's most costly economic reform. It isn't just cultural conservatives who haven't gotten much from Republican rule. Free market conservatives—the kind who choose market principles over business interests when the two conflict—have been disappointed as well.

Perhaps the Great Backlash regards liberals as an elite because sometimes, just like conservatives, liberals *really do act* like an elite.

This is worth stressing, because it demonstrates the confusion that clouds Frank's discussion of his ideological enemies. Almost none of the policies he describes as "free market" actually represent free markets. He points with scorn to the Kansas Republican Party's platform of 1998, which is very anti-statist in its economics, but he doesn't mention that hardly any of the radical planks he cites have become law. Like the culturally conservative proposals that get right-wing pols elected, they seem to be there to keep activists happy, not to change the system. When Frank turns to the state's actual policies, the picture looks very different.

He recounts corporate scandals, for example, in which energy companies tried to "socialize the risk [and] privatize the profits." By definition, that's crony capitalism, not laissez faire. He devotes pages to decrying the decline of the family farm and the rise of the giant agricorp, a phenomenon he lays at the market's door. But while market forces certainly have pushed a lot of former farmers into other lines of work, the enormous enterprises that have replaced them, and which have earned so much of Frank's scorn, aren't exactly free of state protection or farm subsidies. Indeed, they get the bulk of the loot. Corporate welfare queens like ConAgra and Archer Daniels Midland are no more a product of the market than National Public Radio.

Then there are the tax cuts that Frank blames for Kansas' fiscal crisis. Slashing taxes is certainly a free market prescription. But while the state has reduced some levies in the last decade, it also has passed several increases, including a $300 million hike in sales, gas, inheritance, and cigarette taxes in 2002. Meanwhile, according to Karl Peterjohn of the Kansas Taxpayers Network, the state's All Fund budget grew each year during the deregulatory '90s—faster than both inflation and population—while the General Fund budget grew every year but 1992. Far from leading a libertarian revolution, the Cons have been buying votes with tax dollars, same as their Mod rivals.

Just as Republicans aren't always the party of free markets, the Democrats haven't consistently stood for the working man. Late in the book, Frank acknowledges this fact. "Somewhere in the last four decades," he says, "liberalism ceased to be relevant to huge portions of its traditional constituency, and we can say that liberalism *lost* places like Shawnee and Wichita with as much accuracy as we can point out that conservatism won them over." I think this statement is true, but it's also maddeningly vague. How, when, and why did liberalism lose its relevance? Frank doesn't say, though the answers are surely central to his inquiry. He does attack the Democratic Leadership Council types who took over the party in the late '80s and, in Frank's words, "seem to look forward to the day when their party really is what David Brooks and Ann Coulter claim it to be now: a coming together of the rich and self-righteous."

>> John Locke, Original Originalist

ing the many moral, political, and cultural failings of dead white men such as Locke, Voltaire, and Jefferson, Goffman nonetheless argues that these figures helped create a framework that underwrote an ongoing social and scientific revolution that gives people more freedom to choose how to pursue happiness on something like their own terms. The original liberal values of limited government, secularized society, free inquiry, and tolerance, he argues convincingly, underwrote "an explosion of novelty, individual autonomy, and anti-authoritarian revolution that has not yet been *successfully* surpassed."

In Goffman's telling, the Enlightenment institutionalized counterculture, placing it, ironically, at the very center of the good society. Though he ends his narrative in mid-2003, his defense of what John Stuart Mill famously hailed as "experiments in living" seems more relevant than ever in a country in which things such as gay marriage, the legalization of marijuana, and stem cell research are increasingly under attack. ■

Editor-in-Chief Nick Gillespie (gillespie@reason.com) is editor of Choice: The Best of Reason (BenBella Books). A version of this appeared in the Washington Post.

R.U. Sirius

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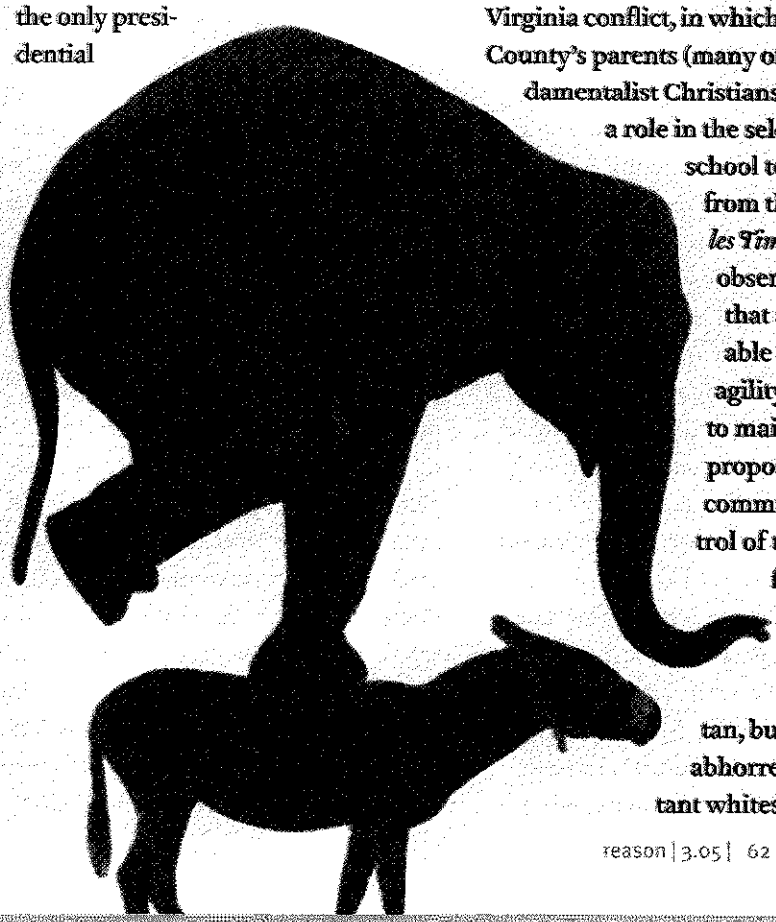
Free Minds and Free Markets

But the backlash began well before then, and Frank himself observes that the party's move to the center was a "response to its waning fortunes," not the original cause of the descent. He never attempts to explain that decline—perhaps because you won't find many clues in Kansas, a state dominated since its founding by the Republicans.

Here's the story Frank should have related but didn't. The old liberal coalition unraveled because of the divisions within it: between blacks and ethnics, between Cold Warriors and the peace movement, between those who run the federal bureaucracy and those who rely on it. George Wallace got blue-collar support in the north with campaigns that mixed racial resentment, heavy-spending economics, and attacks on intellectuals and big government. That platform didn't necessarily harmonize any better than the old Democratic coalition did—Wallace is surely the only presidential candidate to have declared he'd appoint George Meany secretary of labor *and* Milton Friedman secretary of the treasury—but its success with white working-class voters said a lot about the coalition's crippled condition.



This realignment wasn't just a matter of race. In 1976 the sociologist Donald Warren wrote *The Radical Center*, a study of an emerging political species he called Middle American Radicals. This group was marked by a strong distrust of both the rich and the very poor; its mix of left- and right-wing resentments paved the way for the Reagan Democrats and the Perot movement. The conflicts that defined it—anti-busing riots in Boston, textbook fights in West Virginia—were wars over race in the first case and religion in the second. But they were also battles between local power and distant expertise. One of the wiser comments about the West Virginia conflict, in which Kanawha County's parents (many of them fundamentalist Christians) demanded a role in the selection of school texts, came from the *Los Angeles Times*, which observed in 1974 that a "considerable intellectual agility is required to maintain the proposition that community control of textbooks is fine for militant blacks in Manhattan, but altogether abhorrent for militant whites in Appa-

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lachia." Yet such contortions were the standard liberal response to the revolt.

In the busing wars, similarly, the phrase "neighborhood schools" wasn't just a code for segregation. Parents resented the loss of power over their children's educations, not just on white blocks but on black ones. (A substantial segment of the anti-racist movement preferred community control of schools to compulsory integration, and by 1975 a National Opinion Research Center poll found 53 percent of American blacks opposed to busing.) Sometimes the dispute was wrapped up with other localist issues. In at least one case—in the Boston neighborhood of Charlestown—the battle over busing came on the heels of a war over urban renewal, in which the liberal city fathers had wanted to condemn older buildings, subsidize new development, and transform a working-class community into a district for middle-class professionals. To the natives, both fights were waged against an elite bent on destroying their home.

If liberalism, in Frank's words, "ceased to be relevant" to this "traditional constituency," it was at least partly because the leading liberals were acting against that constituency's interests. The hardhats of Charlestown didn't face a laissez-faire Democratic Party that ignored their economic interests and a Republican Party that appealed to their values. They faced a big-government Democratic Party that was actively working against them and in favor of a wealthier group.

They were on the losing end of that struggle: Massachusetts remains a solidly blue state, and Charlestown is now gentrified. West Virginia, on the other hand, is both a swing state and a hotbed of backlash sentiment; in 1999 one of its union locals even endorsed Pat Buchanan for president. (Bush carried the state in both 2000 and 2004.) As for the Republican-red Great Plains, it's curious that in a book on why Kansans have turned against liberalism, Frank never mentions rural resentment of environmental regulations, which have effectively expropriated the property of many small landowners and provoked an intense grassroots revolt.

In short, perhaps the Great Backlash regards liberals as an elite because sometimes, just like conservatives, liberals *really do act* like an elite. You can do that when you have a powerful government at your command. Back in the Progressive Era, Eastern reformers offered a platform of "scientific" management, of giant enterprises and giant government working for the collective good. This set the template for the most destructive species of 20th-century liberalism: the liberalism that bulldozed neighborhoods to build freeways, that flooded farmers' land to erect the Tennessee Valley Authority, that drafted kids to fight in what Bob Dole so accurately called "Democrat wars."

Frank tells some fascinating stories in this book, and he lets loose some clever bon mots. As literature, this is top-notch. As history and as sociology, though, it's just as notable for the stories it chooses not to tell. ■

Managing Editor Jesse Walker (jwalker@reason.com) is author of Rebels on the Air: An Alternative History of Radio in America (NYU Press).

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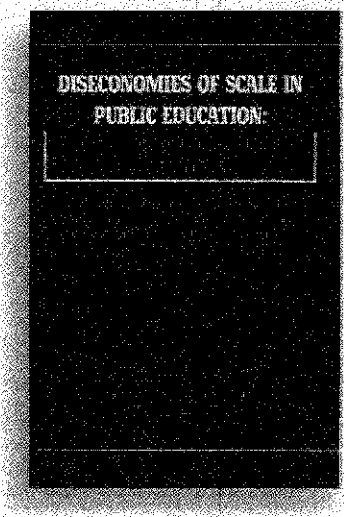

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Labyrinths of Identity

Does it change Borges' fiction to know about Borges' life?

Charles Paul Freund

Jorge Luis Borges, the great Argentine writer, first encountered Cervantes' *Don Quixote* in his father's library, in an English-language translation. Borges was just a boy at the time, and he was soon enraptured by both the work and the edition. The book on his father's shelves was, if I remember correctly, the old Grolier edition with its impressive steel engravings, and it imprinted itself on the imaginative boy's mind.

For the rest of his life, this English version with its evocative visualizations was to remain for Borges the only "real" *Don Quixote*. Of course, he was eventually to read the novel in its original Spanish, but as he was to describe it, the experience was a disappointing anticlimax. Indeed, Cervantes' Spanish prose actually struck him as if it were a clumsy translation from what had become, in his mind, the authentic English version. At least, that's how the imaginative old man told that tale.

I feel the same way about the real Borges that Borges felt about the original *Quixote*: As far as I'm concerned, the real one is a shadow of the literary double that emerged from it. Borges used himself (or some version of himself) by name in a number of his now-famous stories and sketches, and wrote in an unidentified but consistent first-person narrator's voice in many others. These stories, with their contemplations of time and imagination, of dreams and doubles, of labyrinths and mirrors, are among the most admired short works of the last century and may rightly be said to have transformed literary fiction.

The author of these tales is very much at their center: a carefully crafted and essentially imaginary character ("presence" might be a better term) who is sometimes called "Borges." But the real Borges is lately threatening to get in the way of Borges' fictionalized version of himself. If that happens, it may well be a triumph of biographical scholarship, but it's apt to have literary consequences too.

There's a fat new biography of Borges by Edwin Williamson, a professor of Spanish at Oxford. Very thorough stuff. Runs 574 pages, including index, plus xviii pages of prefatory material. As far as I know, Williamson's *Borges: A Life* is the first major inquiry into Borges (at least in English) since his death in 1986. Borges, by the way, strongly believed that a life of reading was not an alternative to a life of action but that it too was legitimately a life of action—only action of a different kind. Much of his literature has to do with reading and is thus about literature. He would appear to be a biographer's challenge, unless that biographer decided that if a life could be about literature, then its biography should be about literature too. Emir Rodríguez Monegal's 1978 "literary biography" of Borges, the first full-length biographical attempt, made just that choice.

Williamson's work reverses this premise. Borges' life was not about literature, he suggests; his literature was—primarily—about his inner life. Since that inner life was filled with unattractive aspects, the literature itself is at issue. Specifically, the "Borges" of the stories ceases to be an appealing narrative presence and threatens to be revealed as a disguise. If one reads the stories through this prism, their subject may well change.

The new biography promises rather a lot. Not only will the biographer chart the evolution of Borges' ideas (great!), it will give you the full man: Borges "in love and in despair" (uh-oh). But that's just the start. Edwin Williamson, promises the publisher, "reconstructs the dynamics of [Borges'] inner world—the conflicts, desires, and obsessions that drove the man and shaped his work."

Williamson's massive and ambitious project is clearly the result of his admiration of Borges' work and his desire to understand its origins. He deserves a sympathetic critique, and he received one from *Washington Post* critic Michael Dirda, who suggested earlier this year that despite what he regarded as the book's flaws, "fans of the Argentine's *fictions* will want to read it without delay."

But Dirda also wrote that the biography "left me at least a sadder if wiser reader: I will miss picturing the author of 'Death and the Compass' as a lovable scholarly antiquarian" rather than as the figure that emerges from Williamson's work. That person, concludes the Dirda, "was essentially a wimp, probably impotent, certainly indecisive and weak-willed, thoroughly self-pitying, surprisingly vindictive and often cowardly."

There's a problem here, an interesting one if one is concerned about reading as an act of pleasure as opposed to literature as a field of scholarship. What interests me is that Dirda writes here as if he has allowed Williamson to intervene in his relationship not only with Borges the author but with "Borges" the fictional presence.

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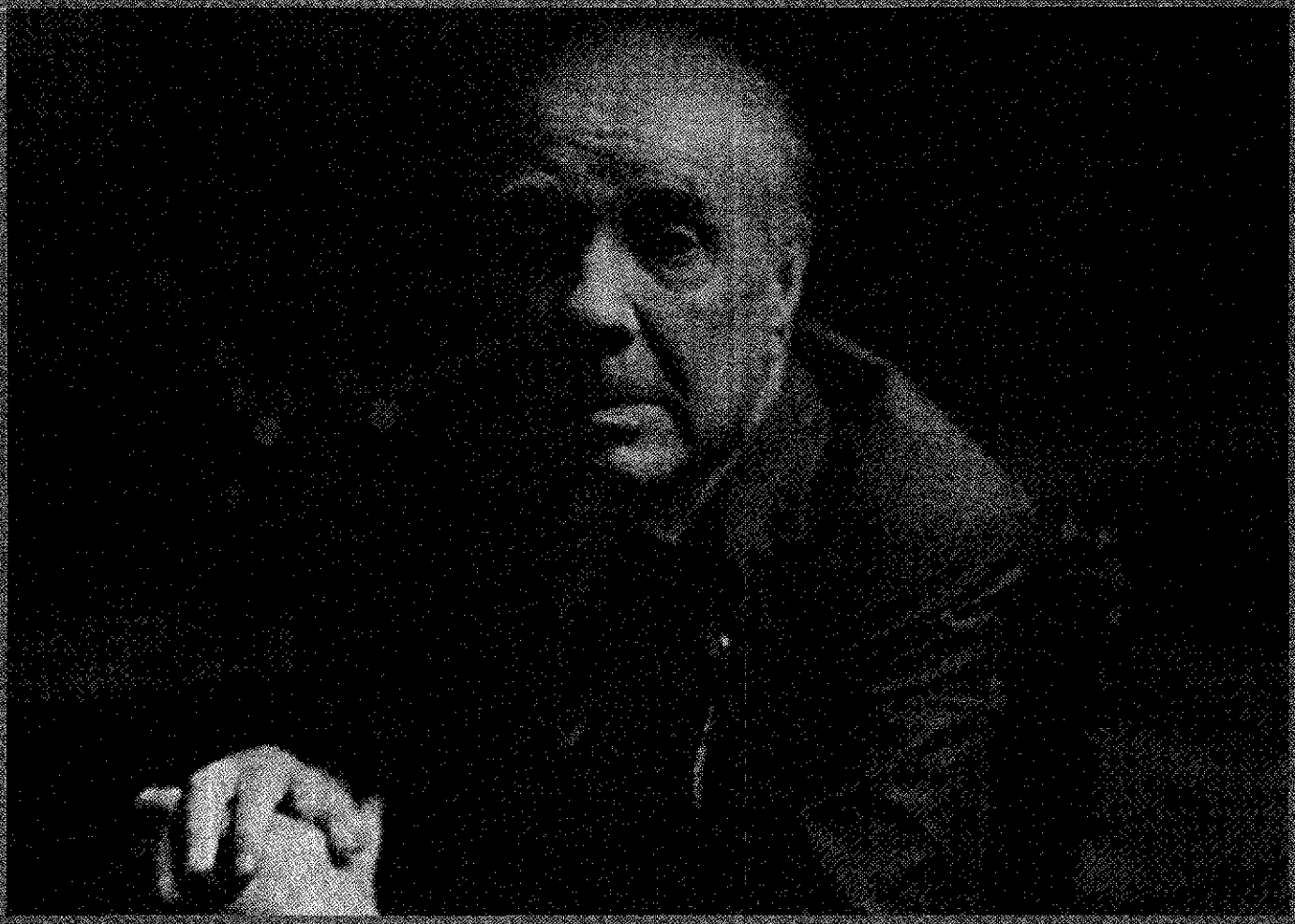

Why is it prudent wisdom to stop imagining Borges "as a lovable scholarly antiquarian"? Because his life might have been a gold digger? Because he allowed himself to be ruled by an imperious mother? Because he might have been impotent? Williamson may be quite right: these factors may have shaped Borges' work in fundamental ways. But they are extraneous to my relationship to the words, which I, after all, I share in imagining as I read them.

The art of imagining an author

happens to be the subject of one of Borges' most famous stories, in "Pierre Menard, Author of Don Quixote," the desire of the writer Pierre Menard to identify with Miguel de Cervantes has been so great that he has sought to write *Don Quixote* himself, not to write a version of it, but rather to become the novel's author and to create it with his own hand. After immense effort, he manages to produce "the ninth and thirty-eighth chapters of Part One," plus a fragment of a third chapter.

It isn't only Menard's imagination that is at issue; it is also the narrator's. "Shall I confess," writes the narrator of Menard's attempt, "that I often imagine that he finished it and that I am reading *Don Quixote*—the entire work—as if Menard had conceived it?" Indeed, the narrator has decided that reading *Don Quixote* as if it were by Pierre Menard renders it a more subtle work, superior to Cervantes' original. A *Quixote* by Menard, concludes the narrator, enriches "the hesitant and rudimentary art of reading."

"Borges" is a narrative presence imagined by the writer, but Borges is an author imagined by the reader. Since I don't believe it is possible to authoritatively reconstruct anybody's inner world, Williamson's Borges is yet another imaginary character, this one imagined by the biographer.

"To be fair to Darda, he ultimately concludes the same thing Williamson has: "imagined" the psychology behind the works, and anyway only the works themselves matter in the point. These works present us with many images and symbols, above all the challenge of Borges' favorite symbol, the labyrinth. Yet the challenge of the labyrinth, and its pleasure as well, is that one enters it alone.

Ukeria Hall is a second-year graduate student in reason's inaugural editor.

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Pre-Islamic wooden idol at Kabul Museum, ©Reuters/Ahmad Masood

Idol Hour

Charles Paul Freund

HERE IS A PAIR of idols apparently acting out a forgotten pagan tale of Central Asia. Part of a collection housed in the Kabul Museum, the wooden statues were badly damaged in 2001 on the orders of the Taliban regime. At the same time that the giant Bamiyan Buddhas were destroyed, the contents of the museum were reduced to rubble. A weeklong orgy of destruction in the museum involved thousands of ancient artifacts. Some of these objects had long been in private collections but were returned to Afghanistan in the 1970s.

Ironically, the presence of the idols in Kabul was once perceived as serving Islam politically. The life-sized figures had a role in the traditional religion of eastern Afghanistan; following the forced conversion of that area in the 19th century, they were brought to Kabul as trophies of war and symbols of Islam's triumph. Taliban clerics, of course, saw them as an offense to Islam.

The West's view of the region's artifacts has changed as well. The Greco-Buddhist mix that marks Gandharan art used to interest only specialists; now it's hot. The Bamiyan Buddhas used to be dismissed as grotesque; now they're sorely missed.

These once-obscure idols were restored by the Austrian government. They went back on display in December. ▮

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A Bow to Fiscal Conservatism

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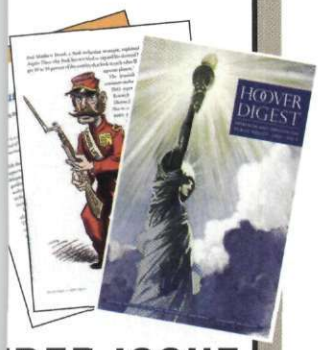

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As the curtain rises on his second term, President Bush doesn't lack for opportunities to secure an enduring legacy. In addition to prosecuting the war on terrorism, the president has indicated that he wants to reform Social Security, simplify the nation's tax code, and institute health savings accounts—all noble yet formidable challenges.

Here's one additional item for that legacy portfolio: a bow to fiscal conservatism by restoring presidential line-item veto authority.

In June 1998, only two years after a Republican Congress and a Democratic president agreed that line-item vetoing was a necessary means to curb Washington's spending appetite, the Supreme Court struck down the president's ability to remove individual projects from congressionally approved legislation. Instead, the president can sign or veto spending and tax bills only in their entirety.

Not surprisingly, Congress has taken full advantage of the situation. According to the budgetary watchdog Citizens Against Government Waste, Congress this past year approved more than 10,600 "pork" items totaling nearly $23 billion—a 13 percent increase over the previous year—at a time when the federal deficit surpassed $422 billion and the national debt topped $7.5 trillion.

With Washington drowning in a sea of red ink, the timing is right to restore line-item authority. The only question is how to proceed.

Here are three options:

1. *Constitutional Amendment.* Separate bills currently before the House and Senate would restore line-item authority by amending the Constitution. Although the approval process is steeper (a two-thirds vote in both chambers of Congress, plus 38 states' approval), it improves the chances of a new law surviving an all-but-certain constitutional challenge by line-item opponents.

2. *Impoundment.* Up to 1974, presidents enjoyed a power known as impoundment: if a president didn't think an appropriation was appropriate, he didn't spend the earmarked money. But amid Watergate and its various intragovernmental power struggles, Congress restricted impoundment. Three decades later, Congress should right that wrong and give the president the ability not to spend money allocated by Congress if that spending is deemed unnecessary.

3. *Enhanced Rescission.* The president does have one option: he can rescind "pork" items and send an entire spending bill back to Congress for reconsideration. However, Congress holds the trump card: if it doesn't act, the president's rescission is automatically rejected. A simple remedy for this would be "enhanced rescission" authority whereby Congress would be forced to vote on the president's request within forty-five to sixty days, thus forcing members to go on the record as for or against fiscal excess.

Will these reforms dramatically reverse the rising deficit tide? Probably not. In the eighteen months that he enjoyed line-item veto authority, President Clinton targeted only eighty-two programs, thirty-eight of which were restored by Congress for an overall savings of a mere $2 billion—a drop in the federal bucket.

Nevertheless, it would send a positive message to a cynical public: if Washington can't halt runaway spending, at least it is willing to hand over the reins to the president and let him try to slow down the horses.

—Bill Whalen

Bill Whalen is a research fellow at the Hoover Institution.

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